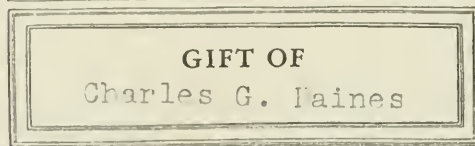
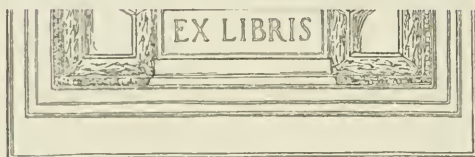






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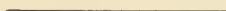
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HOWARD S. ABBOTT

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Head of the Department of Corporations, College of Law
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ILLUSTRATIVE CASES

ON THE

LAW OF PUBLIC CORPORATIONS.

BOARD OF COM'RS OF HAMILTON
COUNTY v. MIGHELS.

(7 Ohio St. 109.)

Supreme Court of Ohio. Dec. Term, 1857.

Error to superior court of Cincinnati.

Ferguson & Long, for plaintiffs in error.
Johnston & Carrall, for defendant in error.

BRINKERHOFF, J.¹ * * * * *

2. Is the action maintainable on the principles of the common law? In entering on this inquiry, it is but justice to ourselves to say that, assisted by the researches of diligent counsel, we have given it an unusual share of labor and attention; and this not only because of the importance of the question itself, but for the reason that the conclusion to which our minds have been compelled is in conflict with a case (*Commissioners v. Butt*, 2 Ohio, 348) decided by judges for whose judgment we entertain that degree of respect which renders even involuntary and irresistible dissent from their conclusions reluctant and self-distrustful.

For the purpose of maintaining this action, an effort has been made in argument to assimilate counties to natural persons and municipal and other corporations proper. Now, it is conceded, that if the negligence, and consequent injury to the plaintiff below, had been the act of a natural person in the construction of a private building, to which the plaintiff below had been invited, the party guilty of the negligence would properly be liable in damages. So, also, it now seems to be well settled that, had the defendants below been the agents of a municipal or other corporation proper, and had the plaintiff below been injured through like negligence and under like circumstances, the corporation might be held to answer for the injury. And why? Because where there is a wrong there ought to be a remedy. Persons, whether natural or artificial, are bound so to use their own property and conduct their own affairs as not to injure others; and where an act is done to the injury of another by a natural person in the pursuit of his own interests, or, through its agents, by an artificial person, a corporation proper, which is called into existence, either at the direct solicitation or by the free consent of the persons composing it for the promotion of their own local and private advantage and convenience, and which can work only through agents, such natural or artificial person is, on every principle of justice and enlightened reason, bound to rectify the consequences of his own misfeasance. And it is freely admitted that if counties are in all material respects like municipal corporations proper, and may be fairly classed with them, then this action ought to be maintained. But how is the fact? This question is vital, and on its solution the case must depend.

As before remarked, municipal corporations

proper are called into existence either at the direct solicitation or by the free consent of the people who compose them.

Counties are local subdivisions of a state, created by the sovereign power of the state, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them. The former organization is asked for, or at least assented to, by the people it embraces; the latter is superimposed by a sovereign and paramount authority.

A municipal corporation proper is created mainly for the interest, advantage, and convenience of the locality and its people; a county organization is created almost exclusively with a view to the policy of the state at large, for purposes of political organization and civil administration, in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport, and especially for the general administration of justice. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are, in fact, but a branch of the general administration of that policy. *Ward v. Hartford Co.*, 12 Conn. 406; *Boalt v. Commissioners*, 18 Ohio, 16; *Cincinnati, W. & Z. R. Co. v. Commissioners of Clinton Co.*, 1 Ohio St. 89.

The idea that the board of county commissioners is the agent of the county or of its people, is prominently advanced and pressed on our attention. That board is, in some sort, the agent of the county, it is true; inasmuch as it alone is authorized to sue and be sued in respect to contracts growing out of the county organization. There is an administrative necessity that some name should be employed as the representative of the public interests involved in such suits; and that of the board of county commissioners has, by law, been designated for that purpose; but the name of the county auditor, or the name of the county itself, had the legislature chosen so to prescribe, would have answered the same purpose quite as well; and the fact, we think, has no special weight or significance.

But it is said the members of the board of county commissioners are chosen by the electors of the county, and hence the board is to be regarded as the agents of the county, for whose torts in the performance of official duties the county ought to be responsible. True, the people of the county elect the board of county commissioners; but they also elect the sheriff and treasurer of the county. Are the people of the county therefore, responsible for the malfeasances in office of the sheriff, or for the official defalcations of the county treasurer? This will not be pretended. And yet, if this case is to rest on the principles governing the relation of principal and agent, wherein is the distinction between the case at bar and the case supposed. We confess our inability to discover any such distinction. In the case of municipal corporations proper, the

¹ Part of the opinion is omitted.

electors are, mediately or immediately, invested with very ample control over their agents, not only as to what shall be done, but how it shall be done, and by whom it shall be done; they may exact such guarantees as they deem proper for their own indemnity, and may prescribe by-laws for their government. As between the commissioner and the electors of a county all this is wanting. All his powers and duties are prescribed by the supreme legislature; and the electors can exercise no control over him whatsoever, except such as springs from the bare fact of election; and to this extent they can control a sheriff or treasurer as well as a commissioner.

Chancellor Kent (1 *Comm.* 572, 573) says that "a great proportion of the rules and maxims which constitute the code of the common law, grew into use by the application of the dictates of natural justice and cultivated reason to particular cases;" and that "the best evidence" of what that law is, "is to be found in the decisions of courts of justice, contained in books of reports, and in the treatises and digests of learned men."

Now, on what principles of "natural justice," or of "cultivated reason," aside from positive statute, the people of a county should be held responsible for the personal or official misconduct of a county commissioner, we are wholly unable to perceive.

But how stands the case upon authority, "by the decisions of courts of justice, and the treatises of learned men?"

The county organization, substantially similar in all its general features and functions, has existed in England from the earliest times, and in all the states of this Union, with perhaps one or two exceptions, more nominal than real, from the period of their settlement; yet the researches of diligent counsel have failed to furnish a single case where an action has been maintained against a county in a case like the one before us, except that of the *Commissioners v. Butt*, before cited, and which was recognized as authoritative in *Richardson v. Speneer*, 6 *Ohio*, 13, but, apparently without any particular examination of the principles on which it was based, or of the authorities bearing upon them.

It is said that the court below sustained the action in the case before us on the authority of *Commissioners v. Butt*; and we concur with the court below in the opinion that, if that case was properly decided, this action must be maintained. We have looked in vain for any substantial distinction between them. In that case, a debtor, having been surrendered by his appearance bail, and committed to the custody of Butt, who was sheriff of Brown county, escaped, by reason of there being no jail in Brown county, and the sheriff not being by law at liberty to imprison the debtor elsewhere than in the jail of the county. The creditor having recovered against him, as sheriff, for the escape, Butt brought his action on the case against the

board of commissioners of the county, to recover the damages he had thus sustained by reason of its neglect of duty to provide a jail. The court, Burnet, J., dissenting, held the action to be well brought, on the ground that the commissioners were the agents and representatives of the county. In that opinion, for the reasons before indicated, as well as on the authorities about to be noticed, we find ourselves unable to concur. We cannot but think that county commissioners are not agents or representatives of the county in any such sense or manner as to render the people of the county justly answerable for their neglect. The reported opinion of the majority of the court in that case may furnish very abundant reason why the utter neglect of county commissioners to furnish a jail, and, the sheriff himself being in no fault, a plea of these facts ought to be held a good bar to an action for an escape, and the creditor turned over to an action against the commissioners personally; or why, if such plea be held bad, the sheriff might maintain his action against the county commissioners in their individual capacity, for the personal injury resulting to him from their neglect,—and as to these alternatives, the question not being directly before us, we express no opinion,—but it affords to our minds no satisfactory reason why the people of a county should be held pecuniarily responsible for the delinquencies of officers over whose acts that people have no supervision or control whatsoever. And the case itself, as before remarked, stands alone. At the time it was made, it was unsupported by any reported case; and, so far as we can ascertain, it remains still unsupported by any case outside of Ohio; while the cases on the other side are uniform, and so numerous as to render a particular notice of all of them too tedious to be attempted.

The leading case on this subject seems to be that of *Russell v. Men of Devon Co.*, 2 *Term R.* 667, which was an action on the case against the men dwelling in the county of Devon, to recover satisfaction for an injury done to a wagon of the plaintiff in consequence of a bridge being out of repair, which ought to have been repaired by the county; to which two of the inhabitants, for themselves and the rest of the men dwelling in that county, appeared and demurred generally. On hearing, the court of king's bench unanimously sustained the demurrer; and this, apparently, on three grounds: (1) That there was no precedent for such an action. (2) By reason of the inconvenience resulting from the multiplicity of actions for contribution to which a recovery and levying of the judgment upon the inhabitants of the county would give rise; and (3) that the county of Devon had no fund out of which satisfaction could be made. And this last reason, it seems to us, applies with great weight to the case in hand. It is true, counties in Ohio have a treasury, and in it various funds. But

those funds are all raised for specific purposes; to those purposes they must be devoted; the commissioners are authorized to levy no tax, except for such purposes as are authorized by statute; and we have no statute authorizing the levy of a tax to satisfy such a judgment as this. And in *Boalt v. Commissioners*, before cited, it was decided that a bill in chancery would not lie against a county to subject equities, and, in the opinion of the court in that case, it is assumed, arguendo, as indisputable, that county bridges, court house, public offices, jail, or poor-house, cannot be sold on execution at law.

In *Riddle v. Proprietors of Locks & Canals on Merrimac River*, 7 Mass. 169, Parsons, C. J., delivering the opinion of the court, clearly lays down the principle on which we proceed. He says: "We distinguish between proper aggregate corporations, and the inhabitants of any district, who are by statute invested with particular powers without their consent. These are in the books sometimes called 'quasi corporations.' Of this description are counties and hundreds in England; and counties, towns, etc., in this state. Although quasi corporations are liable to information or indictment, for a neglect of public duty, imposed on them by law; yet it is settled in the case of *Russell v. Men of Devon Co.*, that no private action can be maintained against them for a breach of their corporate duty, unless such action be given by statute. And the sound reason is that, having no corporate fund, and no legal means of obtaining one, each corporator is liable to satisfy any judgment rendered against the corporation. This burthen the common law will not impose, but in cases where the statute is an authority, to which every man must be considered as assenting. But in regular corporations, which have, or are supposed to have, a corporate fund, this reason does not apply."

The same doctrine is asserted by the same court in *Mower v. Inhabitants of Leicester*, 9 Mass. 247; and is recognized as settled law by *Ang. & A. Corp.* § 630, note. So in South Carolina. *Young v. Commissioners*, 2 Nott & McC. 537, and *White v. City Couneil*, 2 Hill (S. C.) 571. So in Connecticut. *Ward v. Hartford Co.*, 12 Conn. 404. The case of *Freeholders of Sussex Co. v. Strader*, 18 N. J. Law, 108, before alluded to, was an action brought by Strader against the county of Sussex, New Jersey, to recover damages for an injury to a team of the plaintiff, on account of a defect in a public bridge which

the chosen freeholders of the county were bound to keep in repair. In that case the court not only sustain the doctrine and distinction laid down in the *Men of Devon*, and by Chief Justice Parsons in 7 Mass.; but Chief Justice Hornblower, in delivering his opinion, supposes, and remarks upon almost the very case before us. He says: "It is the duty, for instance, of the board of freeholders, to erect and keep in repair court houses and jails; a neglect to do so may occasion great inconvenience, perhaps positive loss or injury to some individual whose business or duty requires his attendance at court; the building, by being old and out of repair, may give way, and break a man's limbs, or occasion him an injury in some other way; but no one will pretend that in such case an action would lie by the person injured against the county."

The same doctrine was recognized and applied in Illinois, in *Hedges v. Madison Co.*, 1 Gilman, 567; by the supreme court of the United States in *Fowle v. Common Council of Alexandria*, 3 Pet. 409; and is also applied and strongly urged and approved by the supreme court of New York in the able opinion of Selden, J., in *Morey v. Town of Newfane*, 8 Barb. 645.

It is undoubtedly competent for the legislature to make the people of a county liable for the official delinquencies of the county commissioners, and, if they think it wise and just, without any power in the people to control the acts of the commissioners, or to exact indemnity from them; but this has not yet been done; and we think that such liability cannot be derived from the relation of the parties either on the principles or the precedents of the common law.

In conclusion, and at the risk of the penalties of tautology, I repeat, that while, both upon principle and authority, we find ourselves compelled to overrule the case of *Commissioners v. Butt*, as having been erroneously decided, we do so with extreme reluctance, and with all respect for the judgment and veneration for the memory of the judges who decided it; but, with our convictions, we could not do otherwise; and, in overruling it, we are satisfied we are contributing to place the law of Ohio upon a footing of sound principle, as well as in harmony with that of other states whose jurisprudence, like our own, rests on the basis of the common law.

Judgment reversed.

ASKEW v. HALE COUNTY.

(54 Ala. 639.)

Supreme Court of Alabama. Dec. Term, 1875.

Appeal from circuit court, Hale county.

W. & W. J. Webb, for appellant. W. B. Young, for appellee.

BRICKELL, C. J. The argument in support of the first and third counts, is the same substantially, and may be thus stated: Counties are municipal corporations, charged with the ministerial duty of keeping in repair the public roads and bridges, so that they shall be safe and commodious ways, for the passage of the public. The law imposing the duty, for misfeasance or nonfeasance in its performance, from which injury ensues to an individual, an action will lie. In support of the argument reference is made to many of the numerous authorities, which hold municipal corporations enjoined to keep streets, and bridges, parts of the streets, in repair, and supplied with the means of performing the duty, are liable for injuries resulting from the non-performance, or the unskillful and negligent manner of performance. A radical error, fatal to the argument, is in treating the county as a municipal corporation. It has corporate characteristics, but it is not a municipal corporation, though often so termed. It is an involuntary political or civil division of the state, created by statute to aid in the administration of government. It is in its very nature, character and purposes, public, and a governmental agency, or auxiliary, rather than a corporation. Whatever of pow-

er it possesses, or whatever of duty it is required to perform, originates in the statute creating it. It is created mainly for the interest, advantage, and convenience of the people residing within its territorial boundaries, and the better to enable the government to extend to them the protection to which they are entitled, and the more beneficently to exercise over them its powers. All the powers with which the county is entrusted, are the powers of the state, and all the duties with which they are charged, are the duties of the state. If these were not committed to the county, they must be conferred on some other governmental agency. The character of these powers, so far as counties in this state are concerned, are all for the purposes of civil and political organization. The levy and collection of taxes, the care of the poor, the supervision and control of roads, bridges and ferries, the compensation of jurors, attending the state courts, and the supervision of convicts sentenced to hard labor, as a punishment, for many violations of the criminal law, it is the general policy of the state to entrust to the several counties, and are all but parts of the power and duty of the state. These powers could be withdrawn by the state, in the exercise of its sovereign will, and other instrumentalities or agencies established, and clothed with them. *Loper v. Henry Co.*, 26 Iowa, 267; *Hamilton Co. v. Mighels*, 7 Ohio St. 109; *Eastman v. Meredith*, 36 N. H. 284; 1 Dill. Mun. Corp. §§ 10-39.¹

* * * * *

¹ Part of the opinion is omitted.

MILLS v. WILLIAMS.

(11 Ired. Law, 558.)

Supreme Court of North Carolina. Dec. Term, 1850.

Appeal from superior court, Rutherford county; Bailey, Judge.

B. F. Moore, for plaintiff. N. W. Woodfin and Mr. Bynum, for defendant.

PEARSON, J. In 1816, the legislature established a county by the name of "Polk." In pursuance thereof justices of the peace were appointed, courts organized, and a sheriff and other county officers elected, who entered upon the discharge of the duties of their respective offices. In 1848 the act of 1846 was repealed, and the question is presented, has the legislature a right, under the constitution, to repeal an act, by which a county is established?

From the formation of our state government, the general assembly has, from time to time, changed the limits of counties, and has, over and over again, made two counties out of one, so that in many instances, even the name of the old county has been lost; and it would seem to an unsophisticated mind, that, where there is the power to make two out of one, there must be the corresponding power to make one out of two. In other words, as the legislature has, undoubtedly, the power to divide counties, where they are too large, that there is the same power to unite them, when they are too small; the power in both cases being derived from the fact that by the constitution "all legislative power is vested in the general assembly," which necessarily embraces the right to divide the state into counties of convenient size, for the good government of the whole. Political and other collateral considerations are apt to connect themselves with the subject of corporations, and thereby give to it more importance than it deserves as a dry question of law; and the unusual amount of labor and learning, bestowed on it, has tended to mystify rather than elucidate the subject. Divested of this mystery, and measured in its naked proportions, a corporation is an artificial body, possessing such powers, and having such capacities, as may be given to it by its maker. The purpose in making all corporations, is the accomplishment of some public good. Hence, the division into public and private has a tendency to confuse and lead to error in the investigation; for, unless the public are to be benefited, it is no more lawful to confer "exclusive rights and privileges" upon an artificial body, than upon a private citizen.

The substantial distinction is this: Some corporations are created by the mere will of the legislature, there being no other party interested or concerned. To this body a portion of the power of the legislature is dele-

gated to be exercised for the public good, and subject at all times to be modified, changed, or annulled.

Other corporations are the result of contract. The legislature is not the only party interested; for although it has a public purpose to be accomplished, it chooses to do it by the instrumentality of a second party. These two parties make a contract. The legislature, for and in consideration of certain labor and outlay of money, confers upon the party of the second part the privilege of being a corporation, with certain powers and capacities. The expectation of benefit to the public is the moving consideration on one side; that of expected remuneration for the outlay is the consideration on the other. It is a contract; and, therefore, cannot be modified, changed, or annulled without the consent of both parties.

So, corporations are either such as are independent of all contract, or such as are the fruit and direct result of a contract.

The division of the state into counties is an instance of the former. There is no contract, no second party; but the sovereign, for the better government and management of the whole, chooses to make the division in the same way that a farmer divides his plantation off into fields and makes cross fences, where he chooses. The sovereign has the same right to change the limits of counties and to make them smaller or larger by putting two into one, or one into two, as the farmer has to change his fields; because it is an affair of his own, and there is no second party, having a direct interest.

A railroad is an instance of the latter. Certain individuals propose to advance capital, and make a road by which it is supposed, the public are to be benefited, in consideration that the legislature will incorporate them into a company with certain privileges. The bargain is struck; neither party has a right to modify, change, annul, or repeal the charter without the consent of the other; and (still to borrow an illustration from the farmer) he has in this case leased out his fields at a certain rent, and has no right to make one larger and another smaller, without the consent of his tenant.

Roads furnish another familiar illustration: The county court has a public road laid out, and an overseer and hands appointed. It may be altered or discontinued by the county authorities, and the overseer and hands have no direct interest or right to be heard in the matter, except as other citizens. But, if the legislature, instead of acting by its agent, the county authorities, choose to make a contract with certain individuals, that, if they will raise funds and make a road, they shall be incorporated with the right to exact tolls, etc., then the road cannot be altered or discontinued without the consent of the corporation.

When a county is established, it is done at the mere will of the legislature, because in

its opinion, the public good will be thereby promoted. There is no second party directly interested or concerned. There is no contract, for no consideration moves from any one, and without a consideration, there cannot be a contract. The discharge of certain duties by the persons, who are appointed justices of the peace, or sheriff, clerk, or constable, can, in no sense of the word, be looked upon as a consideration for establishing the county: In legal parlance, the "consideration is past,"—the thing is done, before their appointment. Some act for the honor of the station, others for the fees and perquisites of office; but their so doing did not form a consideration for the erection of the county, and is a mere incident to their relation as citizens of the county.

It was ingeniously argued that, upon the erection of a county, certain rights attach by force of the constitution, as the right to have at least one member in the house of commons; and as these rights are conferred by the constitution it is insisted that, having attached, it is not in the power of the legislature to take them away.

The argument is based upon a fallacy. It is true, the constitution invests every county with certain rights as incident to its existence as a county. But, by no sound reasoning, can the incident be made to override the principle; and the constitution, by conferring these incidental rights, cannot be by any fair inference made to interfere with the control of the legislature on the subject of counties, as instruments for the good government and management of the whole state.

The constitution preordains these rights, but they are put expressly as incidents to the existence of counties; and although they may very properly enter into the question of expediency, they have no legislative bearing upon the power to create and abolish counties as may to the wisdom of the legislature seem fit. Such statutes are not the result of contracts. There is no second party who pays a consideration, which is the essence of every contract. *Terrett v. Taylor*, 9 Cranch, 43; *Dartmouth College v. Woodward*, 4 Wheat. 633; *Phillips v. Bury*, 2 Term R. 346.

Judgment affirmed.

GUTZWELLER v. PEOPLE.

(14 Ill. 142.)

Supreme Court of Illinois. Dec. Term, 1852.

Error to circuit court, Madison county.

W. Martin and H. W. Billings, for plaintiff in error. Levi Davis and W. H. Herndon, for People.

CANTON, J. We cannot persuade ourselves into a doubt of the authority of the legislature to take from the city of Alton the power to grant licenses to sell spirituous liquors. That right was conferred by the city charter passed in 1837, and the receipts for such licenses contributed towards a fund for the support of paupers within the city. It is within the undoubted jurisdiction of the legislature to determine within what districts of country the inhabitants shall be associated together, for the purpose of supporting the paupers within the prescribed limits. Whether such district shall be a town, city, or county, or even the whole state, is for the lawmaking power to determine. It was as much the right of the legislature to say that the city should support her paupers, as that the county should support hers. So, too, it was for the legislature to determine who should issue licenses to sell strong liquors, and to specify whether the money thus raised should be devoted to the support of paupers, or the maintenance of the police, or to any other purpose. It gave the city no more a vested right to issue licenses, because the legislature specified the objects to which the money should be applied, than if it had been put into the general fund of the city. If the legislature could not take from the city authority the power to issue licenses it certainly had no right to deprive the counties of the same authority. Cities are as much the

creatures of legislative will as are counties, and what may be done with the one they have authority to do with the other. Trustees v. Tatman, 13 Ill. 30, and notes.

Was it the intention of the legislature, by the law of 1851, to deprive the city of Alton of the right which she had hitherto enjoyed of granting these licenses? The language of the law is so explicit that it leaves but one possible answer to the question. After prohibiting the sale and prescribing the penalty for a violation, the act, in the sixth section, provides, that "all laws and parts of laws authorizing licenses to be granted to keep groceries, for the sale of vinous, spirituous, or mixed liquors, are hereby repealed, and the provisions of this act shall extend to all incorporated cities or towns in this state, anything in their charters to the contrary notwithstanding." From this it is too plain to be argued, that it was the intention of the legislature to withdraw all authority which had ever been conferred upon any subordinate governmental agencies to grant licenses for the sale of liquor; and that thenceforth the sale of ardent spirits in less quantities than one quart should be absolutely prohibited. By this law the power is as much taken from the city of Alton, as if she had been expressly named in the act. It was pro tanto a repeal of the city charter and was for that purpose as effectual as if the entire charter had been taken away; and if the legislature had the right to do the latter, they certainly had authority to do the former. The license set up as a defense in this case was issued without authority of the law, and can afford no protection to the defendant for the commission of the act which was in express violation of the law.

The judgment of the circuit court must be affirmed. Judgment affirmed.

STATE ex rel. BROKING et al. v. VAN VALEN, Law Judge.

(27 Atl. 1070, 56 N. J. Law, 85.)

Supreme Court of New Jersey. Dec. 8, 1893.

Original application in the name of the state at the relation of Henry Broking and others for mandamus to James M. Van Valen, law judge of the court of common pleas of Bergen county. Heard on rule to show cause. Denied.

Argued at the June term, 1893, before DEPUE, LIPPINCOTT, and ABBETT, JJ.

Luther Shafer, for relators. Peter W. Stag, for respondent.

LIPPINCOTT, J.¹ * * * * * The contention of the relator here is that neither of these two villages are incorporated, but certainly the statutes relating to them create a board of trustees as a governing body, and confer corporate powers upon them. It is true, the powers are limited, but they are the corporate powers usually conferred upon municipalities of this grade. It is not necessary that all kinds of municipal powers should be conferred: neither is it necessary that the corporate powers bestowed be conferred by express legislative grant, in order to create a body politic and corporate. Such express words are in many instances wanting; but if, from the whole of the statutes, incorporation is inferred, it will be sufficient; and it does seem conclusive, under the ordinary interpretation of the language of the statutes, that corporate powers were conferred. The power to issue bonds in the name of the village is a corporate power, and if they are not possessed of such corporate power the words of the statute giving the power to issue bonds are utterly meaningless. The village of Carlstadt was incorporated within the meaning of section 66 of the act of 1891, in that there was an institution by these laws to regulate and administer the internal affairs to some extent of the inhabitants of that defined locality, in matters peculiar to the village, and not common to the people of the state at large. There was here an incorporated instrumentality to exercise powers, perform duties, and execute functions which were strictly municipal in their nature,—powers, duties, and functions to be exercised by local officers within well-defined territorial limits. Dillon, in his work on Municipal Corporations (volume 1, § 42), lays down a rule which it would appear is clearly applicable in the present case. He says: "Although corporations in this country are created by statute, still the rule is here settled that not only private cor-

porations aggregate, but municipal or public corporations may be established without any particular form of words or technical mode of expression, although such words are commonly employed. If powers and privileges are conferred upon a body of men, or upon the residents or inhabitants of a town or district, and if these cannot be exercised and enjoyed, and if the purposes intended cannot be carried into effect, without acting in a corporate capacity, a corporation is to this extent created by implication. The question is upon the intent of the legislature, and this can be shown constructively, as well as expressly." *Inhabitants v. Wood*, 13 Mass. 193, was a case where the question was whether the plaintiffs were a corporate body, with power to sue. They were not incorporated expressly. But by statute the inhabitants of the several school districts were empowered, at any meeting properly called, to raise money to erect, repair, or purchase a schoolhouse, to determine its site, etc., the majority binding the minority. The opinion of the court was that the plaintiffs possessed sufficient corporate powers to maintain an action on a contract to build a schoolhouse and to make to them a lease of land. The village of Carlstadt, upon a contract to pave sidewalks, could maintain an action; and so, too, could an action be maintained against them to levy the assessments in accordance with the statute, to pay the expense of such paving. The villages here were possessed of limited corporate powers of a very simple grade, but the powers conferred were no less corporate. Acts of the legislature have been frequently passed incorporating towns and villages within townships for special and limited purposes. In such cases the inhabitants of the district incorporated remained inhabitants of the township within which the town is situated for all purposes except those within the objects of the municipal government, and the jurisdiction of the township officers continues over them only so far as not inconsistent with the provisions of the incorporating act. *State v. Troth*, 34 N. J. Law, 387. The village incorporation is of the lowest grade, conferring the most limited powers. It ranks below the borough or the town, but within its range its incorporated powers are as amply protected as those of a city. The conclusion in this case is reached that the villages of Carlstadt and New Carlstadt are incorporated villages within the interpretation of the sixty-sixth section of the act of 1891, as amended, and they cannot take advantage of the other provisions of that act, or be compelled to accept them, except in accordance with the provisions of that section. Therefore the mandamus is refused, with costs.

¹ Part of the opinion is omitted.

SMITH v. CRUTCHER.

(18 S. W. 521, 92 Ky. 586.)

Court of Appeals of Kentucky. Feb. 13, 1892.

Appeal from court of common pleas, Bell county.

Action by A. B. Smith against Z. H. Crutcher to restrain defendant from acting as police judge. From a judgment dismissing the action plaintiff appeals. Affirmed.

J. L. Scott, for appellant.

LEWIS, J. At an election held May 3, 1890, in pursuance of the charter of the town of Pineville approved in 1878, and of an amendment thereto enacted in 1888, appellant, being a candidate for office of police judge of said town, received a majority of votes cast, and thereafter received a commission, and qualified as such. But April 16, 1890, an "Act to incorporate the city of Pineville, in Bell county," was passed and approved, by which an election for office of police judge was provided to be held May 13, 1890, which was held, and appellee was elected to that office; and thereafter appellant instituted this action, and obtained an injunction restraining appellee from acting as such police judge in performance of the duties which he, having qualified, had commenced. But the injunction having upon final hearing been dissolved, and judgment rendered dismissing the action, this appeal is prosecuted. No evidence was heard or answer filed, and the single question is whether the facts stated in the petition, that are to be taken as true, are sufficient to constitute any cause of action. There can be no question of the power of the legislature to pass the act incorporating the "city of Pineville," which

was intended and had the effect to repeal the existing charter of the "town of Pineville," and to regulate municipal affairs, including the qualification and election of officers, without regard to the previous town charter. No question is made in the petition of the qualifications of appellee for the office, of the election having been held on the day fixed in the act of April, 1890, nor of his having received a majority of the votes cast at that election.

It does not make any difference whether there was or not, as alleged, a conspiracy on the part of speculators to induce the legislature to pass the act of April, 1890, nor was it necessary to the validity of that act for it to have been approved or ratified by appellant, the town of Pineville, or the trustees thereof, in the absence of a provision requiring it to be submitted to the people or trustees of the town for ratification or approval; for, as the statute appears to have been passed by the legislature, and approved, it must be treated as valid and effectual for all the purposes of its enactment.

It is, in a general way, alleged in the petition that an unlawful mob or conspiracy was formed between appellee, the city of Pineville, and a large number of persons, for the purpose of seizing control of municipal affairs of Pineville, without authority of law, and that the election of May 13th was held without previous notice. But if, as is admitted in appellant's petition, the election was held on the day fixed by the act of April, 1890, appellee was a citizen of Pineville, had the qualifications prescribed by the city charter, and was voted for by the legal voters of the city, he is entitled to the office, although the manner of holding the election may have been informal; and consequently the action was properly dismissed. Judgment affirmed.

COLER et al. v. DWIGHT SCHOOL TP.
OF RICHLAND COUNTY.

(55 N. W. 587, 3 N. D. 249.)

Supreme Court of North Dakota. April 25, 1893.

Appeal from district court, Richland county; D. E. Morgan, Judge.

Action by William N. Coler and William N. Coler, Jr., partners under the firm name and style of W. N. Coler & Co., against Dwight School Township of Richland County, on the interest coupons of certain bonds. Judgment for plaintiffs. Defendant appeals. Modified and affirmed.

W. E. Purcell and L. B. Everdell, for appellant. McCumber & Bogart, (John L. Pyle, of counsel,) for respondents.

CORLISS, J. The plaintiffs have recovered judgment upon a number of coupons representing the interest on bonds issued by an alleged municipal corporation known as School District No. 22, in Richland county, in the then territory of Dakota. Defendant, not having issued them, is sought to be held liable on these bonds and their interest coupons, by virtue of chapter 44, Laws 1883. At the threshold of the case we are met with the proposition that there is no liability because there was no such corporation as School District No. 22 in existence when these instruments were executed and delivered. It is asserted that the proceedings instituted to effect the organization of such a municipality were fatally defective. It is, in the first place, insisted that there was no petition for the erection of the district presented to and filed by the county superintendent of schools, signed by a majority of the citizens residing in the territory to be affected. Such a petition is required by the statute. Chapter 14, Laws 1879, § 10. The trial judge has found that there was such petition made, and that it was filed as required by law. This finding is challenged. We think that the evidence is sufficient to sustain it. The petition itself was not produced, but we are satisfied that there was ample evidence to warrant a finding by the trial judge that it could not be found, but had been lost or taken away by some former county superintendent, either the one with whom it was originally filed or by one of his successors. There was ample evidence to justify the trial court in holding that diligent search had been made for the paper. The court therefore properly admitted secondary evidence as to the signing and filing of the petition. This evidence sustains the finding.

It is next contended that there was a failure to comply with the provisions of the statute requiring the county superintendent to furnish the county commissioners of the county with a written description of the boundaries of the district, and declaring that such description must be filed in the office of the register of deeds before such district should be entitled to proceed with its

organization by the election of school district officers. Chapter 14, Laws 1879, § 10. It is undisputed that the only attempt to comply with this requirement was by filing a paper, which in words, figures, and form is as follows:

"On January 1st, 188 , the above-named district comprised the following described lands, viz.:

Description.	Sec.	Town	Range	Description	Sec.	Town	Range
For subsequent		changes		see opposite		page	

"Plat of School District No. 22.

TownshipRange..... Township 132, Range 49												
Filed 21st October 1881, at 11 a. m. J. M. Kugler, Co. Clerk.	6	5	4	3	2	1	6	5	4	3	2	1
	7	8	9	10	11	12	7	8	9	10	11	12
	18	17	16	15	14	13	18	17	16	15	14	13
	19	20	21	22	23	24	19	20	21	22	23	24
	30	29	28	27	26	25	30	29	28	27	26	25
	31	32	33	34	35	36	31	32	33	34	35	36
	6	5	4	3	2	1	6	5	4	3	2	1
	7	8	9	10	11	12	7	8	9	10	11	12
	18	17	16	15	14	13	18	17	16	15	14	13
	19	20	21	22	23	24	19	20	21	22	23	24
	30	29	28	27	26	25	30	29	28	27	26	25
	31	32	33	34	35	36	31	32	33	34	35	36
Township.....Range.....						Township.....Range.....						

"Organized October 24th, 1881, by J. H. Kennedy, Co. Supt. of Schools."

We are clear that this does not contain a written description of the boundaries of the district. It merely purports to be a plat of the district. Whether the district is within or without the lines of the plat is left to speculation. But does it necessarily follow that the organization of the district is thereby rendered void? The county superintendent creates the district. His decision, embodied in written form, is the act which calls the new corporation into being, provided he has been given authority to proceed by the presentation and filing of the proper petition. The statute requires him to keep a record of his official acts, (section 12,) and it is to this record that the court must look to see if the district has been formed. The record so kept by the county superintendent shows the following

*Not included.

entry: "District No. 22, organized October 24th, 1881, and includes the following described territory: South half of sections 19, 20, 21, 22, and 23, and all of sections 26, 27, 28, 29, 30, 31, 32, 33, 34, and 35, in township 133, range 49, and one-half of section 5, in township 132, range 49, and sections 24, 25, and 36, township 133, range 50." The statute does not declare that furnishing the county commissioners with a written description of the boundaries, and the filing thereof in the office of the register of deeds, are conditions precedent to the existence of the district. Quite the contrary. The statute refers to the district as a corporation already formed before the doing of these acts. It does not withhold corporate life until the description is furnished and filed. It merely provides that the district shall not be entitled to proceed with its organization by the election of school officers before these acts are performed. The corporation exists; the district officers exist; but no election of officers can be held until after certain acts are performed. This is the plain reading of the statute. Said the court in *School Directors of Union School Dist. No. 4 v. School Directors of New Union School Dist. No. 2*, (Ill. Sup.) 28 N. E. Rep. 49, at page 52: "And the failure of the township trustees to file with the county a map showing the lands embraced in the new district will not have the effect to destroy its corporate existence, or to prevent the directors of a new district from levying taxes for school purposes therein;" citing *School Directors of Dist. No. 5 v. School Directors of Dist. No. 10*, 73 Ill. 250. A municipal corporation may have life, although there are no officers in office. No claim is made that the officers who in fact signed the bonds and coupons were not at least de facto officers of the district, provided there was a legal organization thereof. Nor could it be successfully contended that such officers were not at least de facto officers, there having been an attempt to comply with the law requiring the furnishing and filing of the description before officers should be elected, and the officers being in actual possession of their respective offices and exercising the functions thereof, and there being no other persons pretending to lay claim to such offices. Nor would we reach a different conclusion were we of opinion that the organization of the district was so defective that the proceedings would be set aside on certiorari, or the right of the district to act as such would be denied by judgment in quo warranto. At the time these bonds were issued the district was acting as a de facto district under at least color of organization. It had elected its district officers; had held its district meetings; had voted to borrow money to build a schoolhouse; and it appears to be undisputed that the proceeds of these bonds were used for that purpose, and the inhabitants received the benefit thereof. A schoolhouse has been built, and school has

been taught therein. To allow the defense that the proceedings in the organization were defective to defeat the debt represented by these bonds would, under these circumstances, be to sanction repudiation of an honest obligation. We are firm in the opinion that the legality of the organization of a municipal corporation cannot be thus collaterally attacked. Citizens of the district who are opposed to the formation of such a corporation are not without remedy. Certiorari will reach the action of the county superintendent when without jurisdiction. *People v. Beard of Sup'rs*, 41 Mich. 647, 2 N. W. Rep. 904. The statute allows an appeal. Section 25, c. 14, Laws 1879. The corporate existence may be attacked by quo warranto. *State v. Bradford*, 32 Vt. 50; *People v. Clark*, 70 N. Y. 518; *Cheshire v. Kelley*, (Ill. Sup.) 6 N. E. Rep. 486; *Comp. Laws*, § 5348, subd. 3; *Territory v. Armstrong*, 6 Dak. 226. 50 N. W. Rep. 832. The evils resulting from a doctrine which would permit the legality of the organization of a municipal corporation to be inquired into collaterally—in an action to enforce a debt, in a proceeding to collect a tax levied by the de facto corporation, or in a litigation over a tax title growing out of a tax imposed by such municipality—would be as great as the evils which would flow from the collateral inquiry into the title of a person to an office, the functions of which he is in fact exercising. This same argument reaches the objection that no sufficient petition was ever presented and filed, even assuming that the record sustained the claim that this requirement of the statute was not complied with. It does not follow, because the organization was illegal for want of power in the county superintendent, that at all times, in every species of litigation, and by any person, the existence of the de facto district can be assailed. It is no more essential to the exercise by the county superintendent of this power that a petition should be filed than that it should be signed by a majority of the citizens residing in the district. It is the fact, and not the decision of the superintendent that the fact exists, which gives him jurisdiction. A petition is filed lacking the signature of one citizen to make it a petition signed by a majority of the citizens; in all other respects the organization is regular; bonds are issued, a schoolhouse built, and school taught. Is all this to be ignored, to be treated as illegal, because there was no de jure district? Who are the real parties interested in defeating such a debt? The taxpayers within the district. In what position are those to object who participated in the organization? They have attempted to form a district. They for a time believed that they had formed it. They elect officers; borrow money on bonds for district purposes; build a schoolhouse therewith; and use the money for other purposes connected with the functions of the district.

On what principle can the existence of the district be denied by them for their benefit? If any within the district refrained from affirmative action, still they are chargeable with passive acquiescence when they might have acted, and acted effectually, against the de facto existence of the district, and thus have prevented an imposition upon the innocent who were justified in taking that to be a legal district which was acting as such, and to all appearances was warranted in acting as such. Those who were silent, when in conscience they should have spoken, have no claim upon the equity of this court. They did not protest; they did not appeal; they did not resort to certiorari; they made no effort to have the district attorney overthrow this de facto district by quo warranto; and when the bonds were voted for they appealed to no chancellor to protect their property from an illegal debt. Not only the considerations which lie at the foundation of the rule protecting the public in dealing with a de facto officer, but also a principle very analogous to that of equitable estoppel, protects these bondholders against repudiation under the forms of the law. If there cannot be a de facto school district, there cannot be a de facto city. If illegality in the proceedings to effect organization is fatal to the existence of a district, it is equally as fatal to the existence of a municipal corporation of a higher grade. Given a case where the defects in the incorporation of the city are as fatal as in this case, and then deny to that corporation any effect, although a city government is in fact inaugurated and carried on, and the consequences would be intolerable. Open and acknowledged anarchy would for some reasons be preferable. In after years tax titles would be destroyed; every officer of the city would be a trespasser when the discharge of what would be his duty on the theory of the existence of the corporation led to an interference with the property or person of others. Every police or other peace officer and every magistrate acting under the supposed authority of the city government would be liable for extortion, for assault and battery, for false imprisonment, and could be prosecuted criminally for acts done in good faith in the enforcement of the criminal law. An army of creditors whose savings have gone into the city treasury, and through the treasury into public buildings and other public improvements, find, to their astonishment and dismay, that they have received in exchange beautifully lithographed but worthless bonds as souvenirs of their abused confidence. All that has been done in good faith under color of law is only barefaced usurpation, and to be treated as such for all purposes. Such a doctrine would be the author of confusion, injustice, and almost endless litigation. The imagination cannot embrace all the gross wrong to which it would lead when pushed, as it must be, to its logical consequences.

On the other hand, no great injury can result to the citizens or state by recognizing a de facto corporation; one acting as such under color of organization. If the law is disregarded in the attempt to organize the municipality, the violation of law always can be nipped in the bud by appropriate judicial proceedings. We find that our views are by no means novel. The rule that the existence of a de facto municipal corporation cannot be collaterally assailed has frequently been recognized and applied by the courts. *Stuart v. School Dist.*, 30 Mich. 69; *People v. Maynard*, 15 Mich. 470; *Krutz v. Town Co.*, 20 Kan. 397; *Tisdale v. Town of Minonk*, 46 Ill. 9; *Geneva v. Cole*, 61 Ill. 397; *People v. Farnham*, 35 Ill. 562; *Jameson v. People*, 16 Ill. 257; *Sherry v. Gilmore*, (Wis.) 17 N. W. Rep. 252; *State v. Railroad Co.*, (Nev.) 25 Pac. Rep. 296; *School Dist. No. 2 v. School Dist. No. 1*, (Kan.) 26 Pac. Rep. 43; *Railroad Co. v. Wilson*, (Kan.) 6 Pac. Rep. 281; *Clement v. Everest*, 29 Mich. 19; *Stockle v. Silsbee*, 41 Mich. 615, 2 N. W. Rep. 900; *Burt v. Railroad Co.*, 31 Minn. 472, 18 N. W. Rep. 285, 289; *Mendenhall v. Burton*, (Kan.) 22 Pac. Rep. 558; *School Directors of Union School Dist. No. 4 v. School Directors of New Union School Dist. No. 2*, (Ill. Sup.) 28 N. E. Rep. 49; 15 Amer. & Eng. Enc. Law, 965; 1 Dill. Mun. Corp. § 43; *President, etc., v. Thompson*, 20 Ill. 197; *Town of Enterprise v. State*, (Fla.) 10 South. Rep. 740. See 2 Dill. Mun. Corp. § 894; *State v. Weatherby*, 45 Mo. 17; *Board v. Lewis*, 10 Sup. Ct. Rep. 286; *Austrian v. Guy*, 21 Fed. Rep. 500. In some of the cases time seems to have been considered an element of some importance, but the public may as effectually be deceived by a de facto organization the day after it is complete as a decade thereafter. The time a de facto officer has been in possession of an office is never regarded as controlling. He is as much an officer, as to the public, the day after he intrudes into the office as a year later. "The same rule which recognizes the rights of officers de facto, recognizes corporations de facto, and this is necessary for public and private security." *Clement v. Everest*, 29 Mich. 19-23.

We have treated this power as if the action were upon the bonds themselves, because the holders of interest coupons may recover if they could maintain an action on the bonds under the same circumstances. It is also urged that there was a failure to comply with certain conditions precedent to the valid exercise of the power conferred upon such districts by law to borrow money on district bonds. The statute regulating the issuing of such bonds provides, in substance, that they can be issued only when a majority of the electors of the district present and voting at a district meeting shall vote to issue the same. Chapter 24, Laws 1881, § 1. Section 2 of this act provides: "Before the question of issuing bonds shall be submitted

to a vote of the district, notices shall be posted in at least three public and conspicuous places in said district, stating the time and place of meeting, the amount of bonds that will be required to be issued, and the time in which they shall be made payable, at least twenty days before the time of meeting; and the voting shall be done by means of written or printed ballots, and all ballots deposited in favor of issuing bonds shall have thereon the words 'for issuing bonds,' and those opposed thereto shall have thereon the words 'against issuing bonds;' and if the majority of all the votes cast shall be in favor of issuing bonds, the school board, or other proper officers, shall forthwith proceed to issue bonds in accordance with the vote; but if a majority of all the votes cast are opposed to issuing bonds, then no further action can be had, and the question shall not be again submitted to vote for one year thereafter: provided, however, that the question of issuing bonds shall not be submitted to a vote of the district, and no meeting shall be called for that purpose, until the district school board shall have been so petitioned, in writing, by a majority of the resident electors of said school district." It is contended that the school board was not petitioned to submit the question of issuing the bonds to a vote as required by the proviso to section 2. We think the defendant is not in position to raise this point. The plaintiffs are bona fide holders of the coupons. The recital in the bonds is therefore fatal to this defense. Upon their face appears the following statement: "This bond is issued on the 24th day of June, 1882, by School District No. 22, county of Richland, D. T., for building and furnishing a schoolhouse, under and in pursuance of, and in strict conformity with, the provisions of an act of the legislative assembly of the territory of Dakota, entitled 'An act to empower school districts to issue bonds for building schoolhouses,' approved March 3, 1881, and of a vote of said district at a special meeting had on the 29th day of November, 1881." Upon the back of each bond is the following certificate, signed by the clerk of the district: "I certify that the within bond is issued in accordance with a vote of School District No. 22, of Richland county, Dakota territory, at a special meeting held on the 29th day of November, A. D. 1881, to issue bonds to the amount of twelve hundred dollars." It is obvious from the statute that the officers by whom the bonds are to be issued are intrusted with the duty of determining whether the statute has been complied with as to all matters necessary to give them authority to issue the bonds. Their statement embodied in these bonds therefore estops the district and its successors from showing aught to the contrary. The rule and the reason for it have been so often stated, and are so well known to the profession, that it will suffice to cite some of the numerous authorities on the point: *Inhabitants v. Mor-*

ison, 133 U. S. 523, 10 Sup. Ct. Rep. 333; *Oregon v. Jennings*, 119 U. S. 74-92, 7 Sup. Ct. Rep. 124; *County of Moultrie v. Rockingham, etc.*, Bank, 92 U. S. 631; *Venice v. Murdock*, Id. 494; *Town of Colona v. Eaves*, Id. 484; *Dixon County v. Field*, 111 U. S. 83, 4 Sup. Ct. Rep. 315; *Humboldt Tp. v. Long*, 92 U. S. 642; *Commissioners of Knox Co. v. Aspinwall*, 21 How. 539; *Fulton v. Town of Riverton*, (Minn.) 44 N. W. Rep. 257; 15 Amer. & Eng. Enc. Law, 1295 et seq.; *Burr. Pub. Secur.* 299 et seq. It is not necessary that the power to determine these facts should have been expressly conferred upon the district officers by the statute. "It is enough that full control in the matter is given to the officers named." *Inhabitants v. Morrison*, 133 U. S. 523, 10 Sup. Ct. Rep. 333; *Fulton v. Town of Riverton*, (Minn.) 44 N. W. Rep. 257. Nor is it essential that the statement should set forth in detail that all of the various conditions precedent have been complied with. It is sufficient if it is stated that the bond was issued in pursuance of the statute, designating it in such a manner as to identify it. This is in legal effect a statement that each and all of the necessary preliminary steps were taken to authorize the issue of the bonds. *Inhabitants v. Morrison*, 133 U. S. 523, 10 Sup. Ct. Rep. 333; *Dixon Co. v. Field*, 111 U. S. 83, 4 Sup. Ct. Rep. 315; 15 Amer. & Eng. Enc. Law, 1300; *County of Moultrie v. Rockingham, etc.*, Bank, 92 U. S. 631. But the statement went much further. It asserted that the bonds had been issued under and in pursuance of, and in strict conformity with, the act authorizing their issue, "and of a vote of said district at a special meeting had on the 29th day of November, 1881." The certificate indorsed on the bonds by the clerk was required by the statute to be indorsed thereon. Chapter 24, Laws 1881, § 4. The statute specifies what the certificate shall contain, and this provision was strictly complied with in the issuing of these bonds. This requirement indicates that it was for the protection of the purchaser of the bonds, who might implicitly rely upon the clerk's certificate as conclusive evidence that all necessary preliminary steps had been legally and regularly taken.

We come now to the claim that the plaintiffs have sued the wrong corporation. The defendant did not issue these bonds. If liable at all, it must be by virtue of some statute. Chapter 44, Laws 1883, is pointed to as the act which binds the defendant to pay these bonds. This law provides for a new system. The district school system was to be abolished, and the township school system to take its place. Under this statute it was the duty of the board of county commissioners to divide all organized counties into school townships. The finding of the court is that on May 23, 1883, the commissioners of Richland county duly organized the school township of Dwight in that coun-

ty, and that the territory within this new school township embraced nearly all of the territory of the old school district No. 22; and that the schoolhouse and school furniture belonging to the district were received into and are owned by the defendant. There is sufficient evidence to support the finding that the schoolhouse belonging to district No. 22 is within the territorial limits of the defendant. Under these facts the liability of the defendant on these bonds would be clear, under section 144 of the act, were it not for the provisions of section 136, to which we will in a moment refer. Section 144 provides as follows: "Every school township shall be liable for, and shall assume and pay fully, according to their legal tenor, effect, and obligation, all the outstanding bonds and the interest thereon, of every school district, the schoolhouse and furniture of which are received and included within the school township, and owned thereby, the same as if said bonds had been issued by said school township; and the law which authorized the school district to issue bonds shall apply to the school township the same as if it had originally been authorized to issue, and had issued, the said bonds. The bonds shall be deemed in law the bonds of the school township, with the same validity for securing and enforcing the payment of principal and interest that they would have had against the district that issued them." There can be no question as to the power of the legislature to impose upon a new municipality, which includes all or a portion of the territory of an old municipal corporation, liability for the debts of the old corporation, where the property of the latter is turned over to and received by the former under the law. *Mt. Pleasant v. Beckwith*, 100 U. S. 514; 1 *Dill. Mun. Corp.* § 63; *State v. City of Lake City*, 25 *Minn.* 404; *City of Winona v. School Dist. No. 82*, 40 *Minn.* 13, 41 *N. W. Rep.* 539; *Demattos v. City of New Whatcom.* (Wash.) 29 *Pac. Rep.* 933; *Laramie County v. Albany County*, 92 U. S. 307; *Schriber v. Town of Langlade*, (Wis.) 29 *N. W. Rep.* 547, and cases cited in opinion; *Knight v. Town of Ashland*, (Wis.) 21 *N. W. Rep.* 65-70. See, also, note to *State v. Clevenger*, [Neb., 43 *N. W. Rep.* 243,] in 20 *Amer. St. Rep.* 677. Indeed, many of the cases go much further than is necessary to support this legislation. But it is contended that School District No. 22 has not ceased to exist; that the organization of the defendant is not complete; and the argument from these premises is that district No. 22, and not the defendant, is at present liable for these bonds. The section of the statute on which the claim rests is section 136. It provides as follows: "The adoption of the system herein provided, and the passage and approval of this act, shall not have the effect to discontinue, abolish, and render null such school districts or their organization as they may now exist in any county, but they shall con-

tinue to exist, and their officers to act as such, in law and fact, until the school township organization is complete, so far as it includes any particular district or districts, or the larger part of any particular district. And such township organization shall not be deemed complete, nor such districts so cease to exist, and their officers to act as such, until all matters between the district and the township are adjusted, and the property delivered, funds paid over, and an adjustment is reached for the equalization of taxes and property between the districts which enter into the school township, so far as such taxes and property remain permanent in houses, sites, furniture, and other parts of houses and grounds." The next two sections prescribe the procedure by which the equalization of taxes is to be determined, and the rules which are to govern such equalization. Now, it is quite clear to our mind that section 136 was incorporated in the statute merely to keep the old districts alive, for the purpose of adjusting their rights among themselves, so that taxpayers living in each portion of the new township which formerly constituted a school district should not pay more of the aggregate of the old indebtedness of the several districts embraced in the township than would be equitable, considering the rights of the taxpayers of the other districts, so included, to the same treatment. The school boards of the several old districts consulted, with the county superintendent, a body to adjust these matters, and it was necessary to keep the districts alive for this special purpose after the organization of the township. The legislature intended to work an immediate, radical revolution in the school system for the whole territory. We do not believe that they contemplated that, while a long drawn out contest was going on to settle these questions between the old districts, this new system should be held in abeyance. Moreover, there would be no reason for making the organization of the school township, and its right to carry on the school system, depend upon the determination of a matter, the prior settlement of which was not essential to the corporate existence of the school township and the administration of the school law. Settlement must inevitably come. Should those charged with the duty of making it fail to obey the law, mandamus would set them in motion. The nature of their decision could not be dictated by any court; but they could be compelled to make some decision. The discharge of this duty, whether voluntary or under compulsion, can as well go on after as before the school township becomes liable for the district debts and is authorized to carry on the schools. The township is by the statute made liable for these bonds. It is the formal party against which judgment may be recovered. When execution in the form of mandamus to compel a levy of taxes is applied for, the court will observe the decision of the board of ad-

justment in the apportionment of the burden. If no settlement has at that time been voluntarily reached, the court in a separate proceeding will compel the performance of this duty specially enjoined by law, and when such adjustment is consummated the writ of mandamus to compel the levy of a tax to pay the judgment must observe and follow this adjustment in the apportioning of the tax among the several old districts of the new township. The statute is not clear. The question is by no means free from doubts. If the eye is riveted on section 136 alone there is much force in the defendant's position. But we must scan the whole act to find out its spirit, and in the light of that spirit we must interpret section 136. We can discover a good reason for keeping these districts alive, after the organization of the school township, for the special purpose of adjustment of equities. We believe it would be highly inconvenient to preserve their existence thereafter for general school purposes, and that such was not the intention of the lawmaking power. The existence of these districts for this particular purpose is not incompatible with the existence of the school township. It in no manner interferes with the full exercise by the school township of all its powers. These districts were to be kept alive for a short period, to accomplish a special object entirely foreign to the power conferred upon school townships. Their utter extinction for all purposes contemporaneously with the creation of school townships would have left the latter no more complete-

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ly in possession of all their functions as municipal corporations. Finding no error, the judgment is affirmed. All concur.

On Rehearing.

(May 31, 1893.)

We are asked to grant a rehearing on the assumption that we have overlooked the case of *Dartmouth Sav. Bank v. School Dists.* Nos. 6 and 31, 6 Dak. 332, 43 N. W. Rep. 822. We had not overlooked it. We do not regard it as in point. In that case it might be said that there was no color of organization. There was no petition ever filed, or even signed. In so far as that decision can be regarded as conflicting with our conclusions we feel constrained to differ from the court which pronounced it.

Another matter is referred to in the petition for rehearing which strikes us with much force. It is insisted that, unless we modify the judgment, it will stand as an unqualified judgment against the defendant, to be collected the same as any other judgment against it. To save any question, we will modify the judgment so that the collection of it must be enforced according to the provisions of sections 136-141, c. 44, Laws 1883. The district court will modify the judgment by inserting therein the following clause: This judgment is to be enforced subject to the provisions of sections 136-141, c. 44, Laws 1883; the debt on which it is rendered being a debt subject to equalization as therein provided. Modified and affirmed. All concur.

STATE ex rei. RESSEL v. WHITNEY et al.
(59 N. W. 884, 41 Neb. 613.)

Supreme Court of Nebraska. June 27, 1894.

Application for mandamus by the state on the relation of T. J. Ressel against S. A. Whitney and others. Granted.

W. S. Morlan and Gomer Thomas, for relator. R. L. Keester, J. G. Thompson, and John Everson, for respondents.

POST, J.¹ * * * * *

The reliance of the respondents is apparently upon the proposition that, on the completion of the census mentioned, the said corporation ceased to be a city of the second class, and became eo instanti a village, and that there exists no authority for the division

of villages into wards, and that the election of councilmen by wards is without authority and void. To that proposition we cannot give assent. The rule is well settled upon authority that the existence of a municipal corporation cannot be questioned in collateral proceeding. In Dillon on Municipal Corporations (4th Ed. 43a) it is said: "Where a municipal corporation is acting under color of law, and its existence is not questioned by the state, it cannot be collaterally drawn in question by private parties; and the rule is not different although the constitution may prescribe the manner of incorporation." The conduct of the respondents appears to have been contumacious in the extreme, and is inexcusable in any view of the case. The writ is allowed as prayed, and the costs, including \$60 to the referee, will be taxed to the respondents Zerbe, Whitney, Sullivan, and Turkington. Writ allowed.

¹ Part of opinion is omitted.

MAYOR, ETC., OF CITY OF GUTHRIE v. TERRITORY ex rel. LOSEY.

(31 Pac. 190, 1 Okl. 188.)

Supreme Court of Oklahoma. Sept. 19, 1892.

Appeal from district court, Logan county; E. B. Green, Judge.

Mandamus by the territory of Oklahoma on the relation of Marquis D. Losey against the mayor and common council of the city of Guthrie, to compel defendants to issue a warrant for the payment of relator's claim for money due him from defendants in return for duties performed as referee under direction of the court in fixing the amount of certain claims against the city. Defendants made return to relator's alternative writ of mandamus by way of demurrer, which was overruled, and defendants answered. Relator's demurrer to the answer was sustained, judgment rendered for relator, and a peremptory writ issued, commanding defendants to issue the warrant. From this judgment, defendants appeal. Affirmed.

Bierer & Cotteral, for appellants. H. S. Cunningham, H. E. Asp, and Saml. S. Overstreet, for appellee.

BURFORD, J. On the 22d day of April, 1889, at the opening of the Oklahoma country to settlement and occupancy, a large number of people settled for town-site purposes upon the lands now occupied by the city of Guthrie. The act of congress approved March 2, 1889, contains a provision that no entry of lands for town-site purposes shall embrace more than 320 acres in any one entry. To avoid this inhibition, and segregate more lands for the purpose of trade and business, four separate entries were made of these lands, consisting of 320 acres each, and were severally denominated Guthrie, East Guthrie, Capitol Hill, and West Guthrie. The town-site settlers and occupants of each of these subdivisions organized what were called "provisional governments," under charters adopted by the people at public meetings held for such purpose, and each selected municipal officers, made public improvements, graded streets, erected buildings, constructed bridges, adopted laws and ordinances, and arrested, punished, and imprisoned violators of such ordinances. These provisional governments assumed and exercised all the powers, functions, and authority of legally-constituted municipal corporations, and continued to exercise the same until the month of August, A. D. 1890, when they were consolidated, and organized as a village corporation, under and pursuant to the laws of Nebraska, as adopted and extended over said territory by the act of congress approved May 2, 1890, providing a territorial government for the territory of Oklahoma; and said village of Guthrie succeeded to all the improvements, property, books, and documents of the several provisional governments. During the existence of the several provisional

governments they each contracted and created in various ways pertaining to their municipal affairs certain debts, which remained unpaid at the time the said provisional governments were converted into a legally-constituted municipal corporation. The village of Guthrie continued her corporate existence until after the adjournment of the first territorial legislature, when she organized as a city of the first class, under the laws of Oklahoma, and has ever since remained such, with a mayor, common council, and police officers, exercising all the functions and powers of a municipal corporation, and is composed of the same people, and embraces the same territory, as the original provisional governments of Guthrie, East Guthrie, Capitol Hill, and West Guthrie, and has succeeded to all their property and improvements, and has adopted and appropriated the same. During the session of the first legislature, and after the village of Guthrie had been organized, an act was passed, entitled "An act for the purpose of providing for the allowance and payment of the indebtedness heretofore created by the people and cities of Guthrie, East Guthrie, West Guthrie, and Capitol Hill, now consolidated into the city of Guthrie." Chapter 14, art. 1, St. Okla. This act empowers the district judge of Logan county to appoint three disinterested persons to act as referees to inquire into and pass upon all claims and demands of every character heretofore issued by the four provisional governments for all purposes. "The holders of claims are requested to present them to the referees, supported by affidavit that the claims are bona fide, and were for money advanced, materials furnished, or labor performed for the benefit of the city requiring the same; and the referees are authorized to hear evidence, if they deem necessary. The referees are required to give notice of the time for presentation of claims, and after thirty days all demands not presented are barred." Section 4 of said act provides "that, after the commission or referees shall have passed upon and allowed any and all claims mentioned in this act, they shall make a report to the district court of same, showing the names and amounts allowed by them, and also all claims and the names and amounts disallowed by them, for approval or disapproval of the district judge. And all claims allowed and approved by the district judge shall be certified to the mayor and council of the village of Guthrie, who are hereby authorized and directed to issue warrants upon the village, and payable by the village to the holders and owners, payable in installments, each of the amounts to be in one, two, three, four, and five years, to bear interest at the rate of six per cent. per annum from the date of the allowance by the commission or referees; and said mayor and council of the village of Guthrie shall levy a tax upon the property of the residents of said village to pay the warrants herein referred to, levying same upon each subdivision hereto-

fore constituting Guthrie, East Guthrie, West Guthrie, and Capitol Hill according to the amount of indebtedness created by the city councils, the mayors, and school boards, heretofore acting for and in behalf of the people resident of said cities; each of said cities to be liable for and taxable under this act for the amount of indebtedness created by them." Section 5 is as follows: "That said commission or referees shall be allowed such compensation as the district judge may allow them for the services to be performed by them under this act, and the village of Guthrie shall pay the same to the said commission or referees, upon the order of the district judge."

Acting under the provisions of this statute, the district judge of Logan county appointed the relator, with two others, referees or commissioners, and they qualified and performed the duties required of them in said act, and made their report to the district court. Thereupon the court ordered that the relator be allowed the sum of \$425 for his services as such referee, and ordered that the council issue warrants of the city of Guthrie therefor. This order was presented to the council in session, and a demand made for the warrant, which was refused. The relator applied to the district court of Logan county for an alternative writ of mandate, commanding the city to issue said warrant, or show cause why the same should not be done. The city council made their return to this writ by way of demurrer, and assigned as cause for demurrer "that the court had no jurisdiction to grant the relief prayed for;" that the act upon which the claims were based was unconstitutional, and in conflict with the organic act of Oklahoma; that the petition does not state facts to entitle the relator to the relief prayed for. This demurrer was overruled and exception saved. The city then answered in 11 paragraphs, the first of which was a general denial of the allegations contained in the petition. The relator demurred to the several answers, and the demurrer was sustained as to all of the answers except the first, to which it was overruled. This paragraph was afterwards stricken out, for the reason that the defendant refused to verify the same. The court then rendered judgment for the relator, and issued a peremptory writ of mandamus commanding the defendant to issue said warrant. From this judgment the city appeals, and assigns as error the overruling of her demurrer to the petition, and the sustaining of the relator's demurrer to her several answers.

Some of the questions presented by this record are quite novel and difficult, and of no little importance. The subjects have all been treated ably and exhaustively by counsel on both sides, the several briefs exhibiting evidences of great research and careful study. The first question to be determined in this controversy is as to the legal status or character of the so-called "provisional govern-

ments." It is a well-established rule of law that before there can be a de facto municipal corporation there must be some authority for a de jure corporation. A de facto corporation cannot exist where there is no law authorizing a de jure corporation. *Norton v. Shelby Co.*, 118 U. S. 426, 6 Sup. Ct. 1121; *Evenson v. Ellingson*, 67 Wis. 634, 31 N. W. 342. "The proposition which lies at the foundation of the law of corporations of this country is that here all corporations, public and private, exist, and can only exist, by virtue of express legislative enactment, creating or authorizing the creation or existence of the corporate body. Legislative sanction is, with us, absolutely essential to lawful corporate existence." *Dill. Mun. Corp.* § 37. Was there any legislative sanction to the existence of municipal corporations prior to the act of congress approved May 2, 1890? We are unable to find any such authority. These provisional governments grew out of a necessity made by the absence of legal authority. They were aggregations of people associated together for purpose of mutual benefit and protection. Without any statute law, they became a law unto themselves, and adopted the forms of law and government common among civilized people, and enforced their authority by the power of public sentiment. They had no legal existence; they were nonentities; they could not bind themselves by contracts, or bind any one else; they were morally bound to make just recompense for that which they received in money, labor, or materials, but no such obligations could be enforced against them. The organic act furnished them a sovereign civil government, and supplied the authority for constituting de jure municipal corporations. Then they became and were de facto corporations until such time as they complied with the laws relating to incorporating villages, and became a de jure corporation.

The de jure corporation having succeeded to all the property, public improvements, people, and territory of the provisional governments, has the legislature power to compel the de jure government to pay the debts of its illegal unauthorized predecessor? It is a fundamental rule that a legislature may, by a retroactive statute, cure or ratify any defect which it might have, in the first instance, authorized, unless prohibited by some constitutional or organic provision; or it may, by a retroactive statute, legalize any proceedings that it might have authorized. *Wade, Retro. Laws*, §§ 254, 257, and authorities cited. It can hardly be contended that the legislature could not have authorized the creation of the debts of the provisional governments had there been a legislature prior to their organization; that is, it is not shown that the debts contracted, or any of them, are of a class that a de jure municipal corporation might not have been authorized to contract. Ratification is merely the act of conferring authority retrospectively; and this power must neces-

sarily be measured by the constitutional provisions in force at the date of the curative act, where it is not denied by the constitution in force at the date of the original defective organization or act. *Id.* § 266. Retrospective laws may be enacted for the purpose of furnishing remedies for the enforcement of pre-existent moral obligations which were not legally enforceable. *Commissioners v. Bunker*, 16 Kan. 498; *Weister v. Hade*, 52 Pa. St. 474; *Wade*, *Retro. Laws*, §§ 21-23. Municipal corporations are but subdivisions of the state or territory created for the convenience and better government of its affairs by local officers. Their rights, powers, and duties are the creatures of legislative enactment, and they exist and act in subordination to the sovereign power that creates them. The legislature may determine what moneys they may raise and expend, and what taxation may be imposed, and it may compel a municipal corporation to pay a debt which has any moral or meritorious basis to rest on. *Mayor, etc., v. Tenth Nat. Bank*, 111 N. Y. 446, 18 N. E. 618. In the case of *New Orleans v. Clark*, 95 U. S. 644, the court, in speaking of the power of legislative control over municipal corporations, says: "The power of taxation which the legislature of a state possesses may be exercised to any extent upon property within its jurisdiction, except as specially restrained by its own or the federal constitution; and its power of appropriation of the moneys raised is equally unlimited. It may appropriate them for any purpose which it may regard as calculated to promote the public good. Of the expediency of the taxation, or the wisdom of the appropriation, it is the sole judge. The power which it may exercise over the revenues of the state it may also exercise over the revenues of the city for any purpose connected with its present or past condition, except as such revenues may, by the law creating them, be devoted to special uses, and in imposing a tax it may prescribe the municipal purpose to which the moneys raised shall be applied. A city is only a political subdivision of the state, made for convenient administration of the government. It is an instrumentality with powers more or less enlarged, according to the requirements of the public, and which may be increased or repealed at the will of the legislature. In directing, therefore, a particular tax by such corporation, and the appropriation of the proceeds to some special municipal purpose, the legislature only exercises a power through its subordinate agent which it could exercise directly; and it does this only in another way when it directs such corporation to assume and pay a particular claim not legally binding for want of some formality in its creation, but for which the corporation has received an equivalent." The doctrine here enunciated has been approved by the courts of last resort in nearly all the states, and authorities are numerous sustaining this proposition. See *People v.*

Burr, 13 Cal. 343; *Guilford v. Supervisors*, 13 N. Y. 143. Judge Dillon, in his work on *Municipal Corporations*, (section 75,) thus states his conclusions: "The cases on this subject, when carefully examined, seem to the author to go no further, probably, than to assert the doctrine that it is competent for the legislature to compel municipal corporations to recognize and pay debts or claims not binding in strict law, and which, for technical reasons, could not be enforced in equity, but which, nevertheless, are just and equitable in their character, and involve a moral obligation." In *Guilford v. Supervisors*, 13 N. Y. 143, the court states the rule thus: "The legislature is not confined in its appropriations of public moneys or of the sums to be raised by taxation in favor of individuals to cases in which a legal demand exists against the states. It can thus recognize claims founded in equity and justice in the largest sense of these terms, or in gratitude or charity. Independently of express constitutional restrictions, it can make appropriations of money whenever the public well-being requires, or will be promoted by it; and it is the judge of what is for the public good." See, also, *Thomas v. Leland*, 24 Wend. 65; *Brewster v. Syracuse*, 19 N. Y. 116. The legislature may compel a city to contribute for the erection of a bridge in another city, and appoint commissioners to determine the amount to be contributed. *Carter v. Bridge*, 104 Mass. 236. It was held in *Brewster v. City of New York*, 19 N. Y. 116, that the legislature has power to authorize taxation for the payment of a claim not a legal obligation, and without the consent of the citizens of the municipality. "The power of the legislature to require the payment of a claim for which an equivalent has been received, and from the payment of which the city can only escape on a technical ground, would seem clear." *New Orleans v. Clark*, 95 U. S. 644.

While the contracts and agreements entered into by the provisional governments cannot be enforced as contracts, either against the contracting parties or their successors, it does not necessarily follow that all the debts sought to be collected under this act are without remedy, and might not be enforced in some manner against the present city of Guthrie. If they can, then it presents a stronger reason for legislative action. In *Nelson v. Mayor, etc.*, 63 N. Y. 544, the court said: "It has often been adjudged that if a city obtains money on a void bond, or for an illegal tax, or by mistake, and the money goes into the city treasury, the city can be compelled to refund. If it obtains property under a void contract, and actually uses the property, and collects the value of it from property owners by means of assessments, the plainest principles of justice require that it should make compensation for the value of such property to the person from whom it was obtained. The city, in such case, however, should be held liable only for the actual value of the property, or what it obtained therefor,

and would not be concluded by the contract price." This proposition is supported by the following cases: *Herman v. City of Crete*, 9 Neb. 356, 2 N. W. 722; *Maher v. City of Chicago*, 38 Ill. 266; *Louisiana v. Wood*, 102 U. S. 294; *Chapman v. County of Douglass*, 107 U. S. 348, 2 Sup. Ct. 62; *Clark v. Saline Co.*, 9 Neb. 516, 4 N. W. 246. There is no provision in the federal constitution or the organic act of this territory that contravenes the statute authorizing the village of Guthrie to pay these debts; and, aside from any question of implied liability for money had and received, or property appropriated and converted to the use of the city, it seems clear that the legislature did not exceed its authority in enacting said law. Courts cannot overthrow legislative acts upon the ground that they are vicious in their policy, or evil in their tendencies. Statutes must stand, unless found repugnant to some express provision of the organic law or constitution. *Mount v. State*, 90 Ind. 29; *County of Livingston v. Darlington*, 101 U. S. 407. The legislature is to be the judge of the policy or wisdom of the laws they enact, and, so long as they keep within the constitutional restriction, the courts cannot interfere, however unjust they may seem in their operations. Counsel for the present city of Guthrie cites the case of *State v. Tappan*, 29 Wis. 664, and insist that in that case the court lays down a rule contrary to the doctrine enunciated in the cases we have here-in cited. A careful examination of that case fails to reveal any serious conflict. The decision is based upon local constitutional restrictions, and the general conclusion of the court is in harmony with the adjudicated cases. In summing up his conclusion the learned judge states this proposition: "The legislature may authorize a town to levy taxes therein for public purposes not strictly of a municipal character, but from which the public have received, or will receive, some direct advantage, or where the tax is to be expended in defraying the expenses of the government, or in promoting the peace, good order, and welfare of society, or where it is to be expended to pay claims founded in natural justice and equity, or in gratitude for public services or expenditures, or to discharge the obligations of charity and humanity, from which no person or corporation is exempt." Under this rule the legislature might reasonably say to the village of Guthrie: "You have received some advantage from the work performed and improvements made by these provisional governments, and these claims are founded in natural justice, and we will authorize you to tax your property to pay them." The legislature has seen fit to provide for the payment of these claims. It had the power to enact such a law. We find the statute in conflict with no superior rule or limitation which affects its vitality.

It is contended that the law is special legislation, and hence in conflict with chapter 818, p. 170, 24 Stat., which prohibits the legislatures of territories from passing any local or special laws incorporating or amending the

charter of any city or town or village, or granting to any city or town any special or exclusive privilege, immunity, or franchise. This act does not change or amend the charter, nor does it grant any special privilege or immunity to the village of Guthrie. It simply recognizes a moral obligation on her part to pay certain debts created by her predecessors, from which she received some advantage or benefit, and for which she was not legally liable, and provided a speedy and inexpensive method of determining the amounts and authorized the levy of taxes for raising the revenues to meet and pay the same. In construing a provision of the constitution prohibiting special laws, the supreme court of Indiana in *Mount v. State*, 90 Ind. 29, says: "The granting of relief to individual claimants is not within the provision of the constitution which prohibits the enactment of special laws. Each claim stands on its own merits. A general law could not be made applicable; and, when general laws are not applicable, special ones may be enacted. It is only when general laws are applicable that special laws are forbidden." There is nothing in the act in question that conflicts with the provisions of the act of congress referred to. Nor does the legislature attempt to confer judicial authority upon the commissioners. They can render no judgment. But they make a finding, which is reported to the district court, and this finding and report is subject to revision by the court, and is subject to the ordinary rules of practice in reference to reports of referees. The district court renders the judgment and makes the order which binds the city authorities. Chapter 818, § 4, p. 171, 24 Stat., provides that no municipal corporation shall become indebted in any manner exceeding 4 per centum on the value of the taxable property within such corporation, as shown by the last assessment for territorial and county purposes. The tenth paragraph of appellants' answer to the alternative writ attempts to bring the present city within this inhibition, by alleging that the claims allowed against some of the original subdivisions are in excess of the 4 per cent. limit. The answer discloses the fact that the assessed value of taxable property in the provisional governments prior to the organization of the city was at least \$592,467, and the total claims allowed amount to \$17,779.14, which is less than 4 per cent. of the assessed valuation. And, even if it should appear that the claims are in excess of the limit, it would not invalidate the statute. This congressional provision is a limit on the municipal authorities, but does not limit the power of the legislature to levy assessments on the property within the corporation by proper legislation. The debts and the tax authorized to be levied to pay them owe their authority to this act, (article 1, c. 14, Laws Okla.) and the date of taking effect of this act must be taken as the time when the debt was incurred. There was no liability on the village of Guthrie until the legislature created the liability, and the debts were incurred as of

that date, There is no showing that the assessed valuation of the property liable for said taxes was of less value at that date than when the provisional governments were in control, or that any assessment had ever been made for territorial and county purposes. There was no error in sustaining the demurrer to this paragraph of answer.

Having reached the conclusion that the village of Guthrie was legally liable by legislative enactment for the proper provisional debts, is the city of Guthrie also liable, and can the defendant in the case at bar be required to pay the relator for his services? This question has been passed upon by several courts of the highest resort, and the same conclusion is reached in all. The city of Guthrie succeeded to all the rights, franchises, and property of the village of Guthrie, and is bound by all her contracts and obligations. The legislature made the village of Guthrie liable for these debts and claims. It constituted a part of her legal liabilities at the time the change was made from the village to the city organization. The new was bound to carry out and recognize all the legal contracts and liabilities of the old. A municipal corporation cannot escape the payment of just liabilities by a change of name, a change of organization, or a change of boundaries. The remedy may be for a time suspended or defeated, but the obligation rests the same, and the legal successor which takes the people, the territory, the property, and corporate benefits will be bound to meet the liabilities. *Broughton v. Pensacola*, 93 U. S. 266; *Mobile v. Watson*, 116 U. S. 289, 6 Sup. Ct. 398; *Girard v. Philadelphia*, 7 Wall. 1; *Mount Pleasant v. Beckwith*, 100 U. S. 514; *O'Connor v. Memphis*, 6 Lea, 730.

It is contended that mandamus is not the proper remedy of the relator in this case, and

that he has a remedy at law. It is sufficient to say that, in view of our conclusion that the legislature had the power to require these debts to be paid, it also had the power to determine the manner of their payment, and who should audit and determine the amounts. The legislature also provided who should determine the compensation of the referees, and how the same should be paid. If the city of Guthrie desired to question the amount of compensation, they should have appeared before the district judge at the proper time, and made their objections then, and had their day in court. The law says the judge shall fix the compensation, and order the warrant drawn. This has been done. The city has made no objection before the proper tribunal at the right time, and she cannot now be heard to question the correctness of the amount or the value of the services rendered. All the officers of the city of Guthrie get their powers and authority from the legislature, and they are bound by the legislative acts, and at all times subject to legislative control. If the legislature has seen fit to take this question out of their hands, and intrust it to some other person designated by them, the courts have no right to set aside their actions or question the motive so long as no organic law is violated. There is no discretion in the city officers in reference to compensation of Losey. The only act they can perform is to draw the warrant. It is as much the proper charge against the general city revenue as the salary of any other officer. It is their duty to draw the warrant as directed by the district judge, and mandamus is a proper proceeding to compel them, if they refuse. We find no error in the record. The judgment of the district court of Logan county is affirmed, at the costs of the appellants.

PRINCE et al. v. CROCKER et al.

(44 N. E. 446, 166 Mass. 347.)

Supreme Judicial Court of Massachusetts.
Suffolk. June 15, 1896.

Report from supreme judicial court, Suffolk county; James M. Morton, Judge.

Bill by one Prince and others against one Crocker and others to restrain defendants from proceeding to construct a subway under the streets of Boston. A demurrer to the bill was sustained, and the case reported. Dismissed.

F. A. Brooks and John D. Bryant, for complainants. Solomon Lincoln, for the Boston Transit Commission.

ALLEN, J. The general complaint of the plaintiffs, as stated in their bill, is that, if the transit commissioners are permitted to proceed in the execution of the enterprise committed to them by St. 1894, c. 548, they will involve the city of Boston in an indebtedness or liability of many millions of dollars beyond the limit of indebtedness prescribed by the laws of the commonwealth, and will do this without the authority of the city council or the consent of the taxpaying citizens; and also that this statute would have the effect to deprive the city of many rights and privileges belonging to its inhabitants, and especially that it would infringe rights which relate to the control of the streets and highways of the city by the aldermen and street commissioners; all in violation of the right of the inhabitants of the city to govern themselves.

It is provided by section 40 of the statute that the transit commission shall not "take any land or commence the construction of any subway or tunnel until this act shall be accepted by a majority of the voters of said city voting at some special election called by the mayor," etc. In the printed copy of the subway legislation furnished to us by mutual consent of counsel it is stated that this act was accepted at a special election held July 24, 1894. There is no averment in the bill that no such vote of acceptance had been passed, and, though the briefs on both sides say little or nothing on this point, yet it is implied in the briefs furnished by one of the counsel for the plaintiffs (Mr. Bryant) that there had been such an acceptance, and it is then contended that the people at the polls are not the tribunal to determine what debts shall be incurred by or in behalf of the city, because, by a law which stands unrepealed, that question is to be determined by both branches of the city government, and a two-thirds vote of each branch is required to authorize the incurring of a debt by the city. As the fact of the acceptance of the statute has significance in certain aspects of the questions presented, we will state at the outset that, in the absence of any averment to the contrary, we assume that such a vote of acceptance was duly passed. This is a fact

of which the court should take judicial notice. *Andrews v. Knox Co.*, 70 Ill. 65; *State v. Swift*, 69 Ind. 505; *Rauch v. Com.*, 78 Pa. St. 490. Moreover, it is very doubtful, to say the least, whether the plaintiffs, as taxpaying inhabitants, have any standing to maintain the bill in their own names, except upon the assumption that the vote to accept the statute is virtually a vote to raise or to pay money, within the meaning of Pub. St. c. 27, § 129. In this commonwealth, contrary to what has been held in some other jurisdictions, a suit like the present has been considered not to fall within the general jurisdiction of a court of equity. *Baldwin v. Wilbraham*, 140 Mass. 459, 4 N. E. 829; *Steele v. Signal Co.*, 160 Mass. 36, 35 N. E. 105; *Carlton v. City of Salem*, 103 Mass. 141. By Pub. St. c. 27, § 129, when a town votes to raise by taxation or pledge of its credit, or to pay from its treasury, any money for a purpose other than those for which it has the legal right and power, it may be restrained by this court upon the suit or petition of not less than 10 taxable inhabitants. The case of *Frost v. Belmont*, 6 Allen, 152, was brought under St. 1847, c. 37, which was like Pub. St. c. 27, § 129. The case of *Lowell v. City of Boston*, 111 Mass. 454, was also brought under the similar provision found in Gen. St. c. 18, § 79. No point was there made that under the statute the petitioners had no right to be heard.

It is contended, however, by the present defendants that the plaintiffs have no standing to maintain this bill, but in favor of affording a remedy against a use of public money which is supposed to be illegal we think a somewhat liberal construction should be given, and that the vote to accept the statute is sufficient to give the plaintiffs a standing in court under Pub. St. c. 27, § 129.

The two principal grounds upon which the plaintiffs contend that St. 1894, c. 548, as a whole, is invalid, are that it imposes a heavy debt upon the city, and to a certain extent takes away from the city the control of its streets. The plaintiffs deny the power of the legislature to do either of these things without the authority of the city council, or the consent of the taxpaying citizens of the city. It has, however, been established by a great weight of usage and authority that the legislature may impose such a duty and burden upon towns and cities without their own consent. We do not deem it necessary to go into an extended discussion of this subject, or to consider what objects may be so special or local in their character as not to come within the general rule. As to roads of all kinds and bridges and sewers the doctrine is well established in this commonwealth and elsewhere that the legislature may prescribe what shall be done, and require cities and towns to bear the expense to such an extent and in such proportions as it may determine. The powers which had been given to cities and towns by the legislature by special or by

general laws are in no sense a contract, and do not become vested rights as against the legislature. *Coolidge v. Brookline*, 114 Mass. 592, 596, 597; *Inhabitants of Agawam v. Hampden Co.*, 130 Mass. 528, 530; *In re Kingman*, 153 Mass. 566, 573, 576, 27 N.E. 778; *People v. Morris*, 13 Wend. 325; *Sloan v. State*, 5 Blackf. 361; *People v. Flagg*, 46 N. Y. 401; *City of Philadelphia v. Field*, 58 Pa. St. 320; *Pumphrey v. Mayor*, etc., of Baltimore, 47 Md. 145; *Dill. Mun. Corp.* (4th Ed.) §§ 54, 73, 74, 831, and other cases there cited. If this power were otherwise doubtful, in the present case the statute under consideration is not peremptory and absolute, but it remained inoperative until accepted by a majority of the voters of the city. The plaintiffs contend that the statute is to become operative without the authority of the city council or the consent of the taxpaying citizens; but, if a consent were necessary, we know of no authority or legal reason for requiring any other consent than that of qualified voters. In *Merriek v. Amherst*, 12 Allen, 500, 506, the court, while intimating that no consent at all was necessary, said: "To guard against all danger of mistake, and to obtain the highest evidence from those most interested that the imposition of the tax was not unequal or disproportionate to the expected benefits, the legislature required that it should be laid on the inhabitants of the town unless two-thirds of the voters at a meeting to be called for the purpose should assent to its imposition." The instances where legislatures have provided that towns or cities or counties might or should bear the whole or a portion of the expense of local improvements in case the qualified voters should assent, and not otherwise, are numberless. In our own statutes, from early times, such legislation has been common. In the Public Statutes now in force many instances are found enacting that cities and towns may by vote accept the provisions of certain statutes, and thereupon shall be subject to certain duties and burdens. There have been many special laws to the same effect. It cannot be necessary to cite more than a few illustrative instances: Pub. St. c. 27, §§ 10-13, 27, 29, 44, 65, 69, 74; Id. c. 28, §§ 3, 22, 23; Id. c. 35, § 4; Id. c. 45, §§ 44, 52; Id. c. 50, §§ 20, 22, 25; Id. c. 51, § 10; Id. c. 80, §§ 8-13. By the second amendment to the constitution, city governments cannot be established except with the consent and on the application of a majority of the inhabitants of the town present and voting thereon at a meeting. All of the cities of the commonwealth have been incorporated under this amendment. *Larcom v. Olin*, 160 Mass. 102, 104, 108, 35 N. E. 113. When the legislature imposes such a condition in order to bind a city or town or county to assume a particular burden, it must be complied with; but an assent by vote will give full effect to the statute, and the city, town, or county will thereupon become

bound. *Hampshire v. Franklin*, 16 Mass. 76, 87, 90; *Stone v. Charlestown*, 114 Mass. 214; *Central Bridge Corp. v. City of Lowell*, 15 Gray, 106, 116; *St. Joseph Tp. v. Rogers*, 16 Wall. 644, 662, 663; *Board v. Aspinwall*, 21 How. 539; *Dill. Mun. Corp.* §§ 519, 526, 544, 551-553, and cases there cited. It is not material that the work is not put in charge of the street commissioners of the city. The legislature might provide for doing the work at the expense of the city, but through other agents than those regularly appointed by the city; it might impose liability on the city, incur the expense, and require payment by the city. The acceptance of the act by the city precludes objection on this score, even if such objection would otherwise have been open.

The foregoing considerations apply to the bridge over Charles river, provided for in section 30, as well as to the subway itself.

It is further contended that taxation can only be for a public use; that the term "public use," in reference to taxation, has a more restricted meaning than when applied to the taking of land by eminent domain; that the subway will not be a highway, or open and free to be used by the public for driving or walking; that, when finished, the statute authorizes the transit commission virtually to grant a lease of it to any street-railway company for 50 years; and that the use of the subway which is contemplated is not a public use. That the legislature can authorize a city or town to tax its inhabitants only for public purposes is well settled and familiar. *Opinion of Justices*, 155 Mass. 598, 601, 30 N. E. 1142, and cases there cited. But railroads are always held to be built for public use, whether the right to take land or the right to grant pecuniary aid to them is considered. The legislature of this commonwealth has granted aid to railroad corporations from its own treasury. See instances cited in *Kingman, Petitioner*, 153 Mass. 570, 27 N. E. 778. It has also in a number of instances authorized cities and towns to furnish such aid by subscribing to stock or otherwise. For illustrations, see *St. 1852, c. 156*; *St. 1855, cc. 394, 395*; *St. 1860, cc. 34, 184*; *St. 1861, c. 98*; *St. 1862, cc. 56, 78*; *St. 1863, cc. 96, 104, 105*; *St. 1864, cc. 11, 242, 245, 246, 249, 260*. Finally such municipal aid was authorized by general laws. *St. 1870, c. 325, § 3*; *St. 1874, c. 372, § 35*; *Pub. St. c. 112, § 46*. The constitutionality of such legislation has not been brought into direct controversy before this court, but indirectly it has been recognized. *Kittredge v. Inhabitants of North Brookfield*, 138 Mass. 286; *Com. v. Inhabitants of Williamstown*, 156 Mass. 70, 30 N. E. 472. And elsewhere it has been established by such a weight of judicial authority that we regard it as settled. *Olcott v. Supervisors*, 16 Wall. 678, 694-696; *Railroad Co. v. Oteo Co.*, Id. 667; *Pine Grove Tp. v. Talcott*, 19 Wall. 666; *Dill. Mun. Corp.* (4th Ed.) §§ 153-158, 508. The building of the subway for the carriage of

such passengers as pay the regular fare is therefore for a public use, and it is within the constitutional power of the legislature to order or sanction taxation for it.

The plaintiffs also contend that the statute is in violation of the fourteenth amendment to the constitution of the United States. This objection is not dwelt upon in argument, and it is enough to say that we think it is unfounded.

The plaintiffs further contend that the statute is unconstitutional, because it omits to provide for compensation for property taken or injured, and especially for taking part of the Common and Public Garden. But the plaintiffs cannot be heard to object to the constitutionality of the statute on grounds which only affect others than themselves. *Hingham & Quincy Bridge & Turnpike Corp. v. Norfolk Co.*, 6 Allen, 353; *Davis v. County Com'rs*, 153 Mass. 218, 228, 26 N. E. 848. So far as other private owners are concerned, the plaintiffs do not represent them, and have no standing to be heard in their behalf.

In respect to the matter of providing compensation, the stress of the argument of the plaintiffs rests on the contention that there is no provision for compensation for so much of the Common and Public Garden as may be taken. It is urged that these were dedicated to the use and enjoyment of the inhabitants of the town long before the city charter was granted, and that they are held by the city in trust to secure and promote such use; that the city, as trustee for these purposes, is entitled to compensation if any part of either is taken; and that the fact that the city is the party to pay, as well as to receive, does not affect this argument, because the city acts in two different capacities. If we assume that the plaintiffs are entitled to be heard on this branch of the argument, it is well settled that land already appropriated to one public use may be taken by authority or direction of the legislature for another public use. *Old Colony R. Co. v. Framingham Water Co.*, 153 Mass. 561, 27 N. E. 662. We do not need to go into any nice consideration of the precise capacity, interest, or duty of the city on caring for the Common or Public Garden, because both the legislature and the city have consented to such new use of both as may be included within the terms of the statute. If the right to their use is in the inhabitants of the city, their vote accepting the act binds them. If it is in the public at large, as distinguished from the inhabitants of the city, the interests of the public are under the protection of the legislature. The plaintiffs, in their capacity of taxpaying citizens of Boston, or as voters, or as a constituted part of the public at large, can assert no right to the continued use of the Com-

mon or of the Public Garden as public parks, or to have compensation paid for the surrender of such use, against the combined action of the legislature in passing the statute and of the inhabitants of the city in accepting it. *Commissioners v. Armstrong*, 45 N. Y. 234; *Dill. Mun. Corp.* (4th Ed.) §§ 598, 650-651a, notes, and cases there cited. Under these circumstances we need not pursue the questions relating to the title to and interest of the public in public parks.—questions somewhat discussed in *Abbott v. Cottage City*, 143 Mass. 521, 19 N. E. 325, and *Attorney General v. Abbott*, 154 Mass. 323, 28 N. E. 346.

It is also contended by the plaintiffs that if St. 1894, c. 548, bears such a construction as to allow the transit commission to enter the Public Garden with the subway, the statute is unconstitutional, because it impairs the obligation of a contract between the commonwealth and the city. This supposed contract is found in St. 1859, c. 210, § 3, which provided that the commissioners on the Back Bay should fill up and complete at the expense of the commonwealth so much of Arlington street as remained to be completed, and the strip of land easterly of said street which had theretofore been released by the commonwealth to the city; and, further, that "no building shall hereafter be erected between Arlington and Charles streets, except such as are expedient for horticultural purposes." It is argued that this is a contract that the commonwealth would not erect a building there, and that the subway as constructed is a building, and, if it is authorized by St. 1894, c. 548, then that the statute is a violation of said contract. The short answer to this argument is that the inhabitants of the city have accepted St. 1894, c. 548, and so have consented to whatever is contained therein. Contracts may be waived by the parties to them. If this was a contract, the city was a party to it, and might waive it.

The plaintiffs also contend that the statute is invalid because work to be done under it will increase the debt of the city much beyond the limit of municipal indebtedness fixed by St. 1885, c. 178, § 2. But the same authority which fixed that limit may change it, and section 17, which requires the treasurer of the city to issue bonds, also provides that this debt shall not be included in determining the limit of indebtedness. Similar exceptions have been very numerous in the legislation of the last 10 years. See *Blue Book* for 1895, p. 805. There is no averment in the bill that the limit of indebtedness as thus extended will be exceeded by the issue of the bonds provided for by St. 1894, c. 548.¹

¹ Part of the opinion is omitted.

UPPER DARBY TP. v. BOROUGH OF
LANSDOWNE et al.

(34 Atl. 574, 174 Pa. St. 203.)

Supreme Court of Pennsylvania. March 2,
1896.

Appeal from court of common pleas, Delaware county.

Bill in equity by Upper Darby township against the borough of Lansdowne to apportion indebtedness of the township; the Provident Life & Trust Company and others, holding bonds of the township, being made defendants. From the decree apportioning the debt as between the township and borough, but holding that it could not be apportioned so as to bind the creditors, said borough appeals. Affirmed.

Act June 12, 1878 (P. L. 184), entitled "An act providing for the adjustment of all indebtedness between a township and one or more boroughs erected therefrom, also for the adjustment of the indebtedness of a township changed or merged into one or more boroughs," by section 3 provides: "Whenever any borough has been or may hereafter be erected, as aforesaid, or whenever any township has been or may hereafter be entirely merged into more than one borough, as aforesaid, the court of common pleas of the proper county, sitting in equity, shall have power, upon the application of any one or more creditors of said township or townships, or upon the application of the proper authorities of any said township or townships, borough or boroughs or either of them, by a suit or suits in equity, to ascertain the indebtedness of said township or townships, including judgments against the same, at the time of incorporation of each of said boroughs respectively, and to equitably adjust and apportion said indebtedness between said township or townships and borough or boroughs, and between the several boroughs into which any township shall have become merged as aforesaid, and shall thereupon decree the proportion of said in-

debtedness which each township and borough shall pay; in making said adjustment, as applied to each of said boroughs, reference shall be had to the time of incorporation of such borough, and to the debts then existing, whether since paid or not, and also to the several amounts of township taxes then unexpended; and the said adjustment shall be based upon the assessment of said township or townships for the year in which such borough was incorporated," etc.

Lewis Lawrence Smith, for appellant. Edward A. Price and Jos. B. Townsend, for appellees.

PER CURIAM. The decree appealed from in this case is well made, and conforms to the spirit and letter of the act of the 12th day of June, 1878. The powers of the court are limited to an adjustment of the common indebtedness between the township and borough, so that each may levy and collect, through its own machinery, the amount determined by the court to be its proper share. The act gives to the court no power over the creditor. Each body remains liable to him for the whole of the indebtedness, but, as between themselves, the amount to be paid by the township and borough, respectively, is fixed; so that, if either pays or is compelled to pay more than its share, it will be subrogated to the rights of the creditor as to that amount, and be entitled to collect it from the defaulting body. If the whole debt should be charged up to each as a liability, a credit should be given to each for so much as the decree fixes as the share of the other. In effect, as between themselves, and for the purpose of striking a balance for the purpose of ascertaining the borrowing power of each, the borough and township will thus be charged only with the amount charged against it in the decree, but the rights of the creditors remain as before. The decree is affirmed, the costs of the appeal to be paid by the appellant.

TOWN OF ENTERPRISE et al. v. STATE
ex rel. ATTORNEY GENERAL.

(10 South, 740, 29 Fla. 128.)

Supreme Court of Florida. March 16, 1892.

Error to circuit court, Volusia county; J. D. Broome, Judge.

Quo warranto proceedings on the relation of the attorney general against T. B. Bid-dulph, S. S. Bennett, Andrew Harold, S. A. Donald, George H. Count, and William James to test their right to be a corporation under the name of the "Town of Enterprise." From a judgment of ouster respondents bring error. Reversed.

John W. Price, for plaintiffs in error.

MABRY, J.¹ * * * *

A second corporation, it is alleged, was formed on March 24, A. D. 1884. A fair and complete transcript of the proceedings was prepared by the clerk of said town, embodying the notice by which the meeting was convened to form said corporation, the number of qualified electors present, the seal, territorial limits of said town, and the names of the officers elect, to which the mayor and aldermen attached their signatures, attested by the clerk with said seal, and filed with the clerk of the circuit court, and marked "Filed," but before being recorded was lost, and cannot now be found. The transcript of the proceedings alleged to have been delivered for record complies with the statute in every respect, except it does not embody the name or style of the corporation. This transcript, it seems, in some way disappeared from the clerk's office, and was never recorded. We would not be disposed to pronounce the corporate organization void because of the failure to record the transcript, under the circumstances alleged. If the municipal organization was properly had, and a perfect transcript of the proceedings delivered to the proper officer, whose duty it was to record it, we think the incorporators would then have complied with the requirement of the statute, in so far as the creation of the corporation among themselves is concerned. They had the right to re-establish the lost transcript, and have it recorded. It is not necessary for us to say here what would be the effect of a failure on their part to establish the lost record in a direct proceeding by the state to vacate the municipal government thus formed. There is, however, a defect in this second alleged incorporation which demands our consideration. The alleged metes and bounds of this incorporation show that a part of the territory proposed to be incorporated is detached and disconnected from the other. Sections 1 and 2 of township 19, and sections 35 and 36 in township 18, range 30, constitute one contiguous body; but section 6 in township 18, range 31, is a body one mile square, and distant five miles. We have, then, a

proposed municipal organization, under our general statute for the incorporation of towns and cities, containing, as corporate territory, two separate and detached localities. The query at once presents itself, can this be done? The statute provides that "the male inhabitants of any hamlet, village, or town in this state not less than twenty in number," with the requisite qualifications, may establish for themselves a municipal government. It is alleged in the information that the town of Enterprise was incorporated. In *Railway Co. v. Town of Oconto*, 50 Wis. 189, 6 N. W. 607, it was held that the word "town," as used in the constitution of that state, denotes a civil division composed of contiguous territory, and, under the power given to county boards by statute to set off, organize, vacate, and change the boundaries of towns in their respective counties, such boards cannot make a valid order changing the boundaries of a town, so that it shall consist of two separate and distinct tracts of land. In *Smith v. Sherry*, 50 Wis. 210, 6 N. W. 561, it was said: "The idea of a city or village implies an assemblage of inhabitants living in the vicinity of each other, and not separated by any other intervening civil division of the state." We think that the inhabitants of a hamlet, village, or town recognized as a community of persons authorized to form a municipal government under the general act for the incorporation of cities and towns in force in this state include persons living on contiguous territory, and that an attempt to incorporate two distinct, detached tracts of land, as corporate territory under one government, is unauthorized and void. 1 Dill. Mun. Corp. § 27. The idea of a municipal government, with outlying detached municipal provinces, was not contemplated by the statute. The machinery of government provided by the statute is inapplicable to such a state of affairs. From the allegations of the information our conclusion is that the second attempted incorporation of the town of Enterprise was also illegal.

The third incorporation in question, as appears from the allegations of the information and the transcript of the proceedings, a certified copy of the record of which is filed as a part of the information, was in compliance with the statute. The corporate name is "Enterprise," and the metes and bounds of the incorporation are defined, and all the other requisites of the statute substantially met. It appears from the information that officers were elected, qualified, and discharged official duties under the two first incorporations, but, before the formation of the third, it is alleged that the two former in succession were laid aside, and proceedings were instituted to incorporate again. It is a well-established rule that no collateral attack can be made upon the existence of a corporation. Such bodies derive their being from the sovereign will of the people, and, so long as the state does not question their exist-

¹ Part of the opinion is omitted.

ence, it cannot be controverted in a collateral way on account of irregularities and defects in their organization. *President, etc., v. Thompson*, 20 Ill. 197; *Hamilton v. President, etc.*, 24 Ill. 22; 1 Dill. Mun. Corp. § 43a.

When the last incorporation was formed there was no municipal government in existence under either one of the former attempts at incorporation. Whatever might be the effect of an existing municipal government under a void incorporation, as to the right of the inhabitants therein to organize a new government in opposition to it, we think that, after an abandonment of such organization, the former proceedings would not preclude them from proceeding to organize a municipal government in accordance with the provisions of the statute. The allegation in the information that officers were elected and qualified under the two first incorporations, standing alone, would be no objection against the third incorporation, as it is shown that the organizations under the former were void, and the governments under them abandoned before any proceedings under the latter. The theory here is that the third incorporation is illegal, and the proceedings instituted are to test the right of plaintiffs in error and others to maintain a corporate government. Our investigation so far has conducted us to the conclusion that, as shown by the information, the formation of the third corporation on May 14, A. D. 1885, is legal; and, unless there is something in the acts of the legislature in reference to the two first that will change the result, the demurrer was improperly overruled.

The legislature passed a special act on the 22d day of February, A. D. 1885, about one month before the third incorporation was undertaken, providing "that all the acts done and performed in the organization and incorporation of the town of Enterprise, in the county of Volusia, are declared to be legal and valid in law and equity, and to be considered valid and binding by the laws of the state of Florida." Chapter 3634, Laws Fla. 1885. The first attempted incorporation, in 1877, was void for uncertainty in the territorial limits and metes and bounds of the incorporation. The second one, in 1884, was void because an attempt was made to incorporate into one municipal government two distinct and detached tracts of land, which was unauthorized by the general law for the incorporation of cities and towns. The enactment of this statute was before the adoption of the constitution of 1885. The constitution of 1868 (sections 21, 22, art. 4) provides that the legislature shall establish a uniform system of county, township, and municipal government, and shall provide, by general law, for incorporating such municipal, educational, agricultural, mechanical, mining, and other useful companies or associations as may be deemed necessary. Section 17 of same article prohibits special or local laws in certain enumerated cases, which

it is not necessary to mention. Under the provisions of the constitution of 1868, the legislature could not, by special act, create a municipal corporation, as the clear mandate of that instrument was that provision should be made by general law for incorporating such bodies. The attempted incorporation of the town of Enterprise on the 24th day of March, A. D. 1884, to which the special act was no doubt designed to apply, was not in compliance with the general law on that subject, in this: that it sought to incorporate two detached territories under one government. This could not be done under the general law. Was it competent for the legislature to validate by special act what had been attempted to be done? We are duly sensible of the rule that an act of the legislature, passed in due form, is not to be held invalid by reason of its being supposed to be in contravention of the provisions of the constitution, in a merely doubtful case, and in such case the doubt should turn the scale in favor of the validity of the enactment. We recognize the well-settled rule that it is only in cases where the act of the legislature is clearly repugnant to the constitution that it will be so declared. In *Stange v. City of Dubuque*, 62 Iowa, 303, 17 N. W. 518, a special act of the legislature, attempting to validate a void ordinance of the city of Dubuque granting a street-railway company the right of way for its railroad on certain streets of the city, was pronounced void under a constitution prohibiting the legislature from passing local or special laws for the incorporation of cities and towns. It was said: "As the legislature could not, by special act, have authorized the city of Dubuque to pass the ordinance in question, it follows that it cannot, after the passage of the ordinance, legalize it by special act. The legislature cannot do indirectly what it is inhibited from doing directly." The following authorities sustain this position: *Ex parte Pritz*, 9 Iowa, 30; *Davis v. Woolbough*, Id. 104; *Town of McGregor v. Baylies*, 19 Iowa, 43; *Smith v. Sherry*, supra. The twenty-first section of article 4 of the constitution, which provides that "the legislature shall establish a uniform system of municipal government," was construed in the case of *McConihe v. State*, 17 Fla. 238. It was said: "There is little difficulty in determining the signification of the word 'system,' in this connection. Its general signification is 'plan,' 'arrangement,' 'method,' and, when used in reference to municipal government, it means, simply, rules and regulations for the organization and government of municipal corporations." This being the case, it becomes perfectly clear that the special act in question is in conflict with the constitutional requirement of uniformity in the organization of municipal governments, whatever might be its effect in curing mere defects in the procedure in the organization of a municipal government invested with no

new or different powers than those organized under the general law. 'Uniformity' indicates 'consistency,' 'resemblance,' 'sameness,' a 'conformity' to one pattern. For a full discussion of the special laws prohibited, and the uniformity of the operation of the general legislation under the sections of the constitution in question, see, in addition to *McConehe v. State*, supra, *State v. Stark*, 18 Fla. 255; *Lake v. State*, Id. 501; *Ex parte Wells*, 21 Fla. 280. If municipal corporations can be formed in violation of the general incorporation act on this subject, and then legalized by special act of the legislature, the uniformity of municipal organization demanded by the constitution can be dispensed with by special legislation. No such result as this, we think, can be reconciled with the constitution. We conclude that the special act of 1885 cannot have the effect to make valid what has been done in the attempted organizations of the town of Enterprise. The act cannot validate what was done under either of the first two efforts at incorporation.

In 1887 we find a general act (chapter 3748, Laws Fla.) providing for the legalization of the charters of incorporated cities and towns. This act went into effect after the third incorporation was had. A perusal of this act will show that it has no application to the two first attempted incorporations. There was no municipal government in existence or operation under either at the time the last act took effect. It applies to cities and towns which then, and for 10 years then last past

had, exercised municipal government, and which, on account of certain specified defects in organization, had the legality of their incorporation brought in question. The first two incorporations had been abandoned, and there were no municipal governments under them, and hence this legislation had no application to them. The information shows that the incorporation of May 14, A. D. 1885, was in compliance with the statute, and, this being so, we think the demurrer was improperly overruled.

After the demurrer was overruled, plaintiffs in error filed an answer, and, on motion of the state, a judgment vacating all former incorporations of the town of Enterprise, or Enterprise, was rendered, as well as a judgment of ouster against plaintiffs in error. The motion seems to have been considered as a demurrer to the answer. Great particularity is required in an answer in such proceedings, and a complete legal right must be shown (*State v. Saxon*, supra); but, on demurrer, a bad plea is a good answer to a defective declaration. The infirmity in the record here is in the information filed by the state. From the state's showing, there is no good cause why plaintiffs in error, and others residing in the corporate limits of Enterprise, should not inaugurate and maintain the municipal corporation in question. The statute gives them this right.

The judgment of the circuit court is reversed, with directions that the demurrer to the information be sustained.

STATE *ex rel.* HOLCOMB *v.* INHABITANTS
OF TOWN OF POCATELLO.

(28 Pac. 411, 2 Idaho, 908.)

Supreme Court of Idaho. Dec. 10, 1891.

Appeal from district court, Bingham county; D. W. Standrod, Judge.

Action in the nature of quo warranto on the relation of J. T. Holcomb against the inhabitants of the town of Pocatello to have its charter declared void. Judgment for defendant. Plaintiff appeals. Affirmed.

Geo. H. Gorman and Hawley & Reeves, for appellant. Smith & Smith and T. M. Stewart, for respondent.

SULLIVAN, C. J. This is an action, in the nature of quo warranto, brought in the name of the state by S. C. Winters, district attorney of the fifth judicial district of the state of Idaho, on the relation of J. T. Holcomb, for the purpose of having declared void the charter, and to forfeit the franchises, of the municipal corporation known and designated as the "Inhabitants of the Town of Pocatello." The action is brought under section 4612 of the Revised Statutes of Idaho. The facts as shown by the record are substantially as follows: On the 18th day of March, 1891, the relator, J. T. Holcomb, addressed his verified petition to S. C. Winters, district attorney of the fifth judicial district of this state, alleging that the said relator resides in the town of Pocatello, Bingham county, Idaho, and that he is engaged in the business of retailing spirituous, vinous, and malt liquors and cigars, and has been in said business. The complaint alleges that the inhabitants of the town of Pocatello, in Bingham county, state of Idaho, (under the name of the "Inhabitants of Pocatello.") have since the 23d day of April, 1889, used and exercised all the liberties, privileges, and franchises that an incorporated town or village may use and exercise, under and by virtue of the provisions of section 2230 of the Revised Statutes of Idaho, without any right or authority so to do, to the great damage and prejudice of the state of Idaho and of the relator; that the relator is a resident and tax-payer of said town; and prays that the defendant be excluded from all corporate rights, privileges, liberties, and franchises, and that defendant be adjudged not to be a corporation. The answer denies the allegations of the complaint, and for a further defense alleges substantially that the town of Pocatello had been duly incorporated on the 23d day of April, 1889, by reason of a compliance with the terms and conditions of section 2224 of the Revised Statutes of Idaho, particularly setting out just what had been done thereunder. A general demurrer was interposed to said answer, and overruled by the court. Thereafter the facts were agreed to by the parties, and the case submitted to the court for decision, upon the pleadings and stipulation of facts. Judgment was ren-

dered in favor of the defendant, from which judgment this appeal was taken, and a reversal of said judgment is demanded, and the appellant specifies two errors therefor.

The first error specified is as follows: "In overruling the demurrer to the answer." The demurrer raises the question as to whether the answer states facts sufficient to constitute a defense. In other words, the appellant contends that the facts stated in the answer do not show a legal incorporation of said town by the board of county commissioners, under the provisions of said section 2224 of the Revised Statutes of Idaho. Said section provides as follows: "When a majority of the taxable male inhabitants of any town or village within this territory present a petition to the board of county commissioners of the county in which said town or village is situated, setting forth the metes and bounds of their town or village, together with the adjacent bounds, in all not exceeding six miles square, which they desire to include therein, and praying that they may be incorporated, and police established for their local government, and the county commissioners are satisfied that a majority of the taxable male inhabitants of such town or village have signed such petition, and that the prayer of the petitioners is reasonable, the board of county commissioners may declare such town or village incorporated, designating in such order the metes and bounds thereof." The answer, after denying generally and specifically every allegation of the complaint, alleges as a separate defense as follows: (1) That at the regular April (1889) meeting of the board of county commissioners of Bingham county a petition was filed and presented to said board of county commissioners, signed by 109 citizens, residents and tax-payers of the town of Pocatello, praying, among other things, that said town of Pocatello be incorporated, said petition being in words and figures as follows, to-wit: "To the honorable board of county commissioners of the county of Bingham, in the territory of Idaho: The undersigned, your petitioners, respectfully represent to your honorable body that they are residents of the town of Pocatello. That the town of Pocatello is situated in the county of Bingham, territory of Idaho. That your petitioners constitute a majority of the taxable male inhabitants of said town of Pocatello. That said town is situated within the following boundaries, that is to say: All in township six south, of range thirty-four (34) east, of Boise meridian, to-wit, west one-half section twenty-five, (25,) all of section twenty-six, (26,) east one-half of section twenty-seven, (27,) north-west quarter of section thirty-six, (36,) north one-half of section thirty-five, (35,) north-east quarter of south-west quarter section thirty-five, (35,) north-east quarter of north-east quarter of section thirty-four, (34,) in all not exceeding six miles square. And your petitioners pray that they may be in-

corporated and police established for their local government, and that from thenceforth they may be a body politic and corporate, by the name and style of the 'Inhabitants of the Town of Pocatello,' with all powers, rights, and privileges of incorporated towns and villages, as is contemplated, and in such cases especially provided, by the laws of the territory of Idaho, 1887, Revised Statutes thereof;" and signed by 169 residents and taxpayers of said town of Pocatello. And the answer further alleges facts showing a substantial compliance by the board of county commissioners with the provisions of said section 2224 in the incorporation of said town. The overruling of the demurrer was not error.

The second specification of error is as follows: "In entering judgment against appellant upon the agreed statement of fact submitted." The facts agreed to are substantially as follows: That the relator, J. T. Holcomb, was a resident and tax-payer of the town of Pocatello during all the times mentioned in the pleadings. That the affirmative allegations of the answer, relating to the petition of a majority of the taxable residents of the town of Pocatello, asking that said town be incorporated under the general statutes of Idaho, and the orders of the board of county commissioners in regard thereto, were true. That the meeting of the board at the time said petition was presented was a regular meeting of said board, and that the minutes of said meeting were not signed by the chairman or clerk. That the minutes of the adjourned meeting referred to in the answer were signed by the chairman of said board, and that said meeting was an adjourned meeting. It will be observed that the petition required by said section 2224 was presented to the board of county commissioners at the regular April (1889) meeting. That on the 13th day of April, 1889, said board adjourned their said regular meeting until the 29th day of April, 1889, for the purpose, among others, of considering said petition. The record made on the 29th day of April, 1889, clearly indicates that the said board had satisfied themselves that the said petition had been signed by a majority of the taxable male inhabitants of said town, and likewise had satisfied themselves that the prayer of the petitioners was reasonable, thus complying with the statute in those requirements. The record does not show what steps were taken to satisfy the board that the requisite number of the taxable male inhabitants had signed said petition, and that the prayer of the petition was reasonable, but the action of the board in granting the petition conclusively shows that said board complied with said two requirements, to-wit, had satisfied themselves that the required number of persons had signed said petition and that their prayer was reasonable.

This brings us to the controlling contention of appellant in this case, which is that said town was not legally incorporated, for the rea-

son that the order of the board of commissioners declaring said town incorporated failed to designate the metes and bounds thereof. The provision of said section 2224 is as follows upon that point: "The board of county commissioners may declare such town or village incorporated, designating in such order the metes and bounds thereof." The reason of this provision is obvious. The boundaries of a municipality must be fixed and certain, in order that all may know the scope or section of country embraced within the corporate limits, and over which the municipality has jurisdiction. The statute requires the board to fix the boundaries of the municipality created by them under said act. In case the boundaries are clearly designated in the petition, and the board by its order refers to such petition, and grants it, without any change or modification, it is a sufficient compliance with said provision of the statute. Certainly no one will seriously contend that the boundaries of said town are not set forth in the petition, so that they may be readily traced and easily ascertained therefrom. We are of the opinion that the recital in the order of the board referring to the petition is sufficiently explicit to warrant us in regarding the petition as a part of the proceedings, and may consequently be considered in *pari materia*. *People v. Carpenter*, 24 N. Y. 86. We think there was a substantial compliance with the statute, and that is all that is required. *People v. Railroad Co.*, 45 Cal. 306; *Water-Works v. San Francisco*, 22 Cal. 440; *In re Water-Works*, 17 Cal. 132. In the case of *Com. v. Halstead*, (Pa. Sup.) 7 Atl. Rep. 221, there was a variance in the boundaries, as given in the petition and draft, or plat on file, and the court says: "It appears, as set forth in the eighth assignment, that an error exists in the petition and decree. The description of the boundaries there given is at variance with the draft or plot on file. The proper distances of the sixth boundary line and the bearings of the seventh are omitted. This is manifestly a mere blunder, and might, perhaps, upon proper showing, be amendable here;" thus holding that amendment of description may be made. The appellant insists on a strict construction of said section of the statute. Section 4 of the Revised Statutes of Idaho, among other provisions, provides that "the Revised Statutes establish the law of this state respecting the subjects to which they relate, and their provisions, and all proceedings under them, are to be liberally construed, with a view to effect their objects and to promote justice." The proceedings of the board of county commissioners, under the statute, in the incorporation of said town, are commanded by said section 4 to be liberally construed with a view to effect the intended object. The said town was incorporated on the 29th day of April, 1889, and used and exercised the liberties, privileges, and franchises which it was authorized to use and exercise under the laws of Idaho, without question, until the commencement of this suit, on March 24, 1891.

Thus for nearly two years the legality of said corporation was not questioned. No appeal was taken from the order of the board incorporating said town. The grievance of the relator is that said municipality insisted on taxing him \$100 per month for retailing cigars and spirituous liquors within the boundaries of said municipality. Charters of municipal corporations, which have for their objects the

protection of the lives and property of the people, in densely populated districts, should not be overturned and set at naught except for very grave reasons. The corporate existence of such municipalities should be maintained, if possible. The judgment of the court below is affirmed, with costs.

MORGAN and HUSTON, JJ., concur.

ABB.CORP.—3

FORSYTH et al. v. CITY OF HAMMOND.

(41 N. E. 950, 142 Ind. 505.)

Supreme Court of Indiana. Nov. 7, 1895.

On rehearing. For former report, see 40 N. E. 267.

Miller, Winter & Elam, A. L. Jones, J. W. Youche, and Thos. J. Merrifield, for appellants. E. D. Crumpacker, for appellee.

HOWARD, C. J. / One of the positions taken by counsel in support of their petition for a rehearing of this case is that the circuit court had no jurisdiction of the appeal from the board of county commissioners, for the reason that the annexation of territory to a city is a legislative, and not a judicial, function, and, as such, in case of unplatted lands, the board of county commissioners is given sole and final jurisdiction in the premises. / The proposition so advanced was not urged in the original argument, nor on the trial of the cause, and is now brought to our attention for the first time; but, as it is a question that affects the jurisdiction of the trial court, and also of this court, it is one that will be entertained at any time.

It may be conceded that annexation of territory to a city is a legislative function. This function is exercised by the common council when it resolves to annex certain described lands to the city, and to present a petition therefor to the county board. It must be admitted, however, as we think, that the after proceedings had upon the petition are of a judicial nature. The petition must give the reasons why, in the opinion of the council, the annexation should take place. The sufficiency of such reasons, and whether they in fact exist, call for the decision of the tribunal appointed to hear the petition. Notice of the presentation of the petition is also provided for, and adverse parties are thus brought in. Whether the proper preliminary steps have been taken, whether the reasons given in the petition are true and are sufficient, seem to be questions calling for a judicial examination and decision. In a similar case (*Grusenmeyer v. City of Logansport*, 76 Ind. 549) it was said by Woods, J., speaking for this court, that "the decision of the board in such a case is judicial, and not merely administrative or legislative." But if the board, in considering and deciding upon the petition, acts in a judicial capacity, certainly the legislature may, as it has done in this case, provide for an appeal to the courts, to determine whether the city council and the county board have complied with the statutory requirements in the action taken. It is the law itself, as has been said, that fixes the conditions of annexation; and the office of the board and of the court is to determine whether the conditions so prescribed by the law have been complied with. The legislature has expressly provided for such judicial determination by the board and for an appeal therefrom to the courts, and this court has

frequently recognized the right to such appeal. Section 4224, Rev. St. 1894 (section 3243, Rev. St. 1881); *Catterlin v. City of Frankfort*, 87 Ind. 45; *Chandler v. City of Kokomo*, 137 Ind. 295, 36 N. E. 847; *Wileox v. City of Tipton* (at this term) 42 N. E. 614. See, also, *Manufacturing Co. v. Emery* (at this term) 41 N. E. 814. See, also, *City of Wahoo v. Dickinson*, 23 Neb. 426, 36 N. W. 813.

In *Forsythe v. City of Hammond*, 68 Fed. 774, Baker, J., in passing upon an application, made to the United States circuit court for the district of Indiana by one of the appellants in the case at bar, to enjoin the appellee from collecting taxes upon the lands annexed in this proceeding, speaking of the question now under consideration said: "The power to hear and determine whether the conditions prescribed by law for the creation, enlargement, or contraction of a municipal body exist is judicial in its nature, and may be appropriately conferred upon the courts. The creation, enlargement, or contraction of a municipal body is not the act of the court, but is the act and result of the law. The court simply determines whether the conditions are present which authorize the creation of a municipal body, or the enlargement or contraction of its limits; and, when these conditions are judicially ascertained, the law, ex proprio vigore, creates the municipal body, or enlarges or contracts its boundaries."

Counsel next repeat the contention that the action of the common council of East Chicago, in attempting to annex to that city certain of the lands here in controversy, without first having secured the assent of the owners of that part thereof adjacent to the city, cannot be attacked collaterally in this case. We cited in the original opinion numerous authorities to the proposition that the jurisdiction of an inferior tribunal, as a common council, may be attacked collaterally, and evidence offered to show that the tribunal did not have jurisdiction of the subject matter or of the parties. We have attentively read the acute analysis made of those authorities by counsel, and are still satisfied that the authorities so cited do establish the truth of the proposition stated. We are inclined to think that counsel have not carefully distinguished between facts as to the jurisdiction of a body and facts as to the proceedings and acts of that body after jurisdiction is shown. If there is jurisdiction, then the decision that follows is conclusive, except on direct attack. But jurisdiction itself may always be inquired into, and it is only after jurisdiction is established, both of the subject matter and of the person, that the decision of the tribunal will be invulnerable to collateral attack. As said by this court in *Board v. Markle*, 46 Ind. 96, cited in the original opinion: "The facts which it is said must be shown to exist before the matter can be within the jurisdiction of an inferior court,

and which can be inquired into collaterally, are such as in the absence of which the court cannot rightfully hear and determine any question touching the matter in controversy. Hence a recital in the record of such facts may be shown to be false." See, also, *State v. Hudson*, 37 Ind. 193. As bearing upon the question, see, further, *Rape v. Heaton*, 9 Wis. 328; *Thompson v. Whitman*, 18 Wall. 457; *Withers v. Patterson*, 27 Tex. 491; *Scott v. McNeal*, 154 U. S. 34, 14 Sup. Ct. 1108; *Works, Courts*, §§ 20, 23, 25, 26.

In the case at bar it is not doubted that the owners of the lands adjacent to the city of East Chicago, and which it was attempted to annex to the city, had never assented to such annexation, but that the only petition for annexation presented to the common council was by owners of lands not adjacent to the city; yet the claim is made that the question of the right of the council to annex such adjacent lands, and also the nonadjacent lands, is foreclosed by the record. The city council assumed that the petitioners for annexation were the owners of the lands adjacent to the city, and it is said that this assumption is conclusive, although in fact the owners of the adjacent lands did not assent to such annexation. If that contention were good, why could not any person go before a city council, claim falsely to be the owner of adjacent lands, and petition for their annexation to the city, and, if the record of the common council should show that upon such petition the lands were annexed, how could the decision be collaterally called in question? The law, however, gives the council jurisdiction to annex adjacent lands only on the written assent of the owners. It is clear that the common council had no jurisdiction of the subject matter.

In cases cited in the original opinion we think it is shown that this court has more than once decided practically the same question here raised, namely, that attempts at annexation of lands to cities made by common councils not having jurisdiction are void, and may be attacked collaterally, as well as directly. *City of Indianapolis v. McAvoy*, 86 Ind. 587; *City of Delphi v. Startzman*, 104 Ind. 343, 3 N. E. 937; *City of Indianapolis v. Patterson*, 112 Ind. 344, 14 N. E. 551.

Counsel devote much argument and research to show that where the jurisdiction of an inferior tribunal depends upon a fact which such tribunal is required to ascertain and settle by its decision, such decision, in general, is conclusive. It needed but a statement of that

proposition to establish its truth. But it does not follow that such tribunal, by claiming jurisdiction, can establish it. If the law fixes what is necessary to acquire jurisdiction, the tribunal cannot take jurisdiction not so authorized by law. The law requires notice to parties who are to be subjected to the decisions of the tribunal. Jurisdiction, therefore, cannot be taken without such notice. But as the tribunal must itself decide whether the notice is sufficient, its decision on such sufficiency is conclusive. So, when a petition is to be filed, such petition is necessary to give jurisdiction, and the tribunal, by finding that a petition was filed, when in fact it was not, could not take jurisdiction. But as the tribunal is the only body to pass upon the sufficiency of the petition, whether it is in proper form, has the requisite number of signers, and whether the persons signing have the proper qualifications, etc., its decision on such questions is final.

Stoddard v. Johnson, 75 Ind. 20, one of the leading cases on this subject, and relied upon by counsel, is in harmony with this holding. That case decides that the presentation of a petition for the improvement of a highway gave the county commissioners jurisdiction over the subject matter of the petition, and that whether the petition was in all respects sufficient was a jurisdictional question, which the board had a right to decide for itself. The court, however, is careful to say that it is not to be understood as holding that "any petition, however defective or irrelevant, will be deemed sufficient to invoke the jurisdiction of the commissioners to decide upon its sufficiency, and to impart validity to that decision as against collateral attack." The correct rule is stated in the same case, "that once the jurisdiction of an inferior tribunal is established over the subject matter and the parties to a proceeding which may be had before it, the same presumptions are indulged in favor of the regularity of its action as prevails in favor of the action of the courts of general powers." Had the common council in the case before us acquired jurisdiction over the lands to be annexed and lying adjacent to the city, and had it also acquired jurisdiction over the owners of such lands, then the subsequent proceedings, however defective, would not be void; but, not having acquired jurisdiction over the lands or over its owners, the annexation proceedings were a nullity.¹

¹ Part of the opinion is omitted.

JOHNSON et al. v. CITY OF SAN DIEGO.
(No. 19,483.)

(42 Pac. 249, 109 Cal. 468.)

Supreme Court of California. Oct. 9, 1895.

In bank. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by P. L. Johnson and others against the city of San Diego to determine what proportion, if any, of the bonded indebtedness of San Diego was properly chargeable on certain territory excluded from that city. From the judgment rendered, defendant appeals. Affirmed.

William H. Fuller and Clarence L. Barber, for appellant. S. M. Shorridge and Gibson & Titus, for respondents.

HENSHAW, J. Appeals from the judgment and from the order denying a new trial. Under an act of the legislature approved March 19, 1889 (St. 1889, p. 356), a portion of the territory formerly embraced within the corporate limits of the city of San Diego was excluded therefrom. The act referred to was in its nature permissive. It provided for the calling of an election upon petition, at which election the qualified electors within the territory proposed to be segregated should vote separately from the other voters of the municipal corporation, and the votes cast in such territory should be canvassed separately from the votes cast by the other electors of the municipality. If a majority of the votes cast in the territory proposed to be excluded and a majority of the votes cast in the municipality proper should both be for the segregation, then, after certain formalities had been complied with, the territory should cease to be a part of the municipal corporation, "provided [so runs the law] that nothing contained in this act shall be held to relieve in any manner whatsoever any part of such territory from any liability for any debt contracted by such municipal corporation prior to such exclusion: and provided further that such municipal corporation is hereby authorized to levy and collect from any territory so excluded from time to time, such sums of money as shall be found due from it on account of its just proportion of liability for any payment on the principal or interest of such debts; such assessment and collection shall be made in the same manner and at the same time that such assessment and collection is levied and made upon the property of such municipal corporation for any payment on account of such debts: and provided further that any such territory so excluded from any municipal corporation may at any time tender to the legislative body of such municipal corporation the amount for which such territory is liable on account of such debts, and after such tender is made such authority as is herein given municipal corporations to levy and assess taxes on such

excluded territory shall cease." Under this law, the territory known as the "Coronado Beach," which contains the land of these plaintiffs, was excluded from the corporate control of the city of San Diego. At the time of this exclusion, the city of San Diego had a bonded indebtedness of \$484,000; and, after this exclusion, the city continued to assess and levy taxes upon the detached territory to meet the requirements of this bonded indebtedness, which taxes these plaintiffs duly paid. In 1893 the legislature passed an act entitled "An act providing for the adjustment, settlement and payment of any indebtedness existing against any city or municipal corporation at the time of exclusion of territory therefrom and the division of property thereof" (St. 1893, p. 536). Plaintiffs availed themselves of the provision of this act to have the court determine what proportion, if any, of the bonded indebtedness of San Diego, was properly chargeable against the excluded territory. The demurrer of the defendant city to their petition was overruled; and the court, after hearing evidence, found the existence of the bonded indebtedness; that all of the moneys received by the city and evidenced by this indebtedness had been expended for a sewer system, for the purchase of school sites and the erection of schoolhouses, for refunding a pre-existing debt of the city, and for clearing its titles to certain real estate, and for buying certain rights of way; and that no portion of the money had been expended upon or within the excluded territory. The value of the property belonging to the city at the time of the segregation was found to be \$600,000, all of which remained within its boundaries and under its control after the segregation. It was further found that the city of San Diego had never made any improvements in the excluded territory, and had never owned any property in it. The ratio of the value of the excluded territory to that of the city immediately preceding the exclusion was as 1 to 14. Under these findings, and in strict accord with the dictates of the statute, the court adjudged that there was nothing due or to become due from the excluded territory to the city.

The chief contention of the defendant, raised upon demurrer, pressed in its motion for a nonsuit, and urged against the judgment, may be thus stated: The property owners of the city and the property owners of the excluded territory, when, in accordance with the permissive act of the legislature (St. 1889, p. 356), they elected to segregate Coronado Beach, did so under a contract expressed in the act itself, by which the property owners of the excluded territory were allowed to remove their land from the jurisdiction of the city, with the understanding that they should continue to pay their pro rata share of the municipal debts existing at the time of the exclusion; that the rights of the city vested under this con-

tract cannot be destroyed or impaired by subsequent legislation; and that, therefore, to the parties to this controversy the statute of 1893 has no applicability.

This contention is first met by the respondents with the declaration that the act of 1889 did not impose or mean to impose a pro rata liability upon the excluded territory, but only a liability for a just proportion of the debt, which proportion was a subject of future ascertainment or determination; and much nice argument is advanced in its support. But the language of the proviso, that "nothing contained in the act shall be held to relieve in any manner whatsoever any part of such territory from any liability for any debt contracted by such municipal corporation prior to such exclusion," would seem to be a comprehensive pronouncement that the segregated territory should, after exclusion, be held by the same liabilities as bound it before; and, as before its exclusion it was liable for its pro rata share of these debts, it must be that after exclusion it remained subject to the same liabilities. We think, therefore, that, by the only just and reasonable interpretation of which the act in question is susceptible, the legislature, in permitting the division, exercised its undoubted power to adjust the burden of the existing corporate debt, and decreed that the excluded territory should continue to bear its former proportion of that burden.

The question that is left for consideration is that of the power of the legislature to change and readjust the burden of such an indebtedness after having, in the act of separation, declared in what manner it should be borne. Municipal corporations, in their public and political aspect, are not only creatures of the state, but are parts of the machinery by which the state conducts its governmental affairs. Except, therefore, as restrained by the constitution, the legislature may increase or diminish the powers of such a corporation,—may enlarge or restrict its territorial jurisdiction, or may destroy its corporate existence entirely. Says Cooley: "Restraints on the legislative power of control must be found in the constitution of the state, or they must rest alone in the legislative discretion. If the legislative action in these cases operates injuriously to the municipalities or to individuals, the remedy is not with the courts. The courts have no power to interfere, and the people must be looked to, to right, through the ballot box, all these wrongs." Cooley, *Const. Lim.* (6th Ed.) p. 229. "A city," says Mr. Justice Field, in *New Orleans v. Clark*, 95 U. S. 644, "is only a political subdivision of the state, made for the convenient administration of the government. It is an instrumentality, with powers more or less enlarged, according to the requirements of the public, and which may be increased or repealed at the will of the legislature." This right of legislative control, arising from the very nature of the creation of such corporations, is established under the well-settled doctrine that such corporations have no vested

rights in powers conferred upon them for civil, political, or administrative purposes; or, as Dillon states it: "Legislative acts respecting the political and governmental powers of municipal corporations not being in the nature of contracts, the provisions thereof may be changed at pleasure where the constitutional rights of creditors and others are not invaded." *Dill. Mun. Corp.* (4th Ed.) § 63.

The act of the legislature in relieving Coronado Beach from the corporate control of San Diego and in adjusting the burden of the city's debt, was undoubtedly the exercise of a proper power directed to the political and governmental affairs of the municipality. That the legislature, by the terms of the act segregating the territory, had the right to dispose of the common property, and provide the mode and manner of the payment of the common debt, imposing its burden in such proportions as it saw fit, is a proposition undisputed and indisputable. It is equally well-settled law that, when the act of segregation is silent as to the common property, and common debts, the old corporation retains all the property within its new boundaries, and is charged with the payment of all of the debts. Upon these two propositions the cases are both numerous and harmonious. *People v. Alameda Co.*, 26 Cal. 641; *Hughes v. Ewing*, 93 Cal. 414, 28 Pac. 1067; *Los Angeles Co. v. Orange Co.*, 97 Cal. 329, 32 Pac. 316; *Town of Depere v. Town of Bellevue*, 31 Wis. 120; *Laramie Co. v. Albany Co.*, 92 U. S. 307; *Lycoming v. Union*, 15 Pa. St. 166; *Mount Pleasant v. Beckwith*, 100 U. S. 514; *Layton v. City of New Orleans*, 12 La. Ann. 515; *Beloit v. Morgan*, 7 Wall. 619. There is authority, however, holding that, when the legislature has spoken in the original act, rights vest under it which may not be impaired; and it is upon these cases that appellants rely. Thus, in *Bowdoinham v. Richmond*, 6 Greenl. 93, the supreme court of Maine decided in 1829 that as the act of the legislature dividing the town of Bowdoinham, and incorporating a part of it into a new town, by the name of Richmond, enacted that the latter should be held to pay its proportion towards the support of all paupers then on expense in Bowdoinham, a later act exonerating the new town from this liability was void. The court held that by the former act a vested right of action arose in favor of the old town against the new, and that the later act, in destroying this right, impaired the obligation of the contract on the part of Richmond created by the first act. Just how the court reached the conclusion that a contract was created by the first act is not plain, but it seems to have been based somewhat upon the conviction that the assent of the old town was necessary to the segregation. The opinion, however, looks for authority to the case of *Hampshire Co. v. Franklin Co.* (decided in 1890) 16 Mass. 75. In that case the legislature had created the county of Franklin out of territory formerly a part of the county of Hampshire. The act was si-

lent as to the disposition of the public property and the public debt. By an act passed two years later, the legislature provided in effect that if, at the time of the segregation, there were funds belonging to the county of Hampshire in excess of its debts, the new county should be entitled to such proportion of those funds as the assessed value of the property of the new county bore to the assessed value of the property of the old. The supreme court decided, in accordance with the undoubted rule, that as the first act was silent upon the subject, all of the common property within its limits belonged to the old county, which was likewise charged with all existing debts. It further held that rights vested under this act, and that the later act providing for an apportionment violated these rights in attempting to give the property of Hampshire to Franklin county; in other words, that the later act created a debt from Hampshire to Franklin county which before had not existed. It is to be noticed that in this case the original act was silent as to common property and debts, but as, in such case, the law steps in and makes disposition of them, the silence was deemed equivalent to an affirmative declaration of the legislature making disposition which could not afterwards be modified.

But, distinguished as are the courts which have announced this doctrine, their views have not been followed, and the decisions themselves have been elsewhere criticised and rejected, until it may be safely said that it is the general rule that, where the original act does not make disposition of the common property and debts, the legislature may at any subsequent time, by later act, apportion them in such manner as seems to be just and equitable. Under the decisions adopting this rule, the theory of vested rights and contractual relations is rejected as being a false quantity in the dealings of the sovereign state with its governmental agents and mandatories; and while it is not denied that the state may make a contract with a municipal corporation, or may permit municipal corporations to enter into binding contracts with each other, which contracts it cannot impair, these contracts must be in their nature private, although the public may derive a common benefit from them, and the contracting cities are as to them measured by the same rules and entitled to the same protection as would a private corporation. The subject of such a contract, however, can never be a matter of municipal polity or of civil or political power, for the legislature itself cannot surrender its supremacy as to these things, and thus abandon its prerogatives, and strip itself of its inherent and inalienable right of control.

Of the cases so holding, either directly or impliedly, a few may profitably be mentioned: In *County of Richland v. County of Lawrence*, 12 Ill. 1, the facts were that the former county had been carved out of the territory of the latter by an act making no disposition of the county property. The state had

given to the county of Lawrence a large sum of money, which it held at the time of segregation. By a later act the legislature declared that the new county should be entitled to receive from the old a certain proportion of this fund, which sum the old county refused to pay under the claim of vested right and ownership. The supreme court upheld the act, declaring that there was no contract between the state and the old county, which was merely the state's agent. The case of *Hampshire Co. v. Franklin Co.*, supra, is unfavorably reviewed. In *Perry Co. v. Conway Co.*, 52 Ark. 430, 12 S.W. 877, the original act, detaching territory, made no apportionment of the debt. A later act, which did so, was attacked as unconstitutional. The supreme court there said: "The earlier doctrine (still followed by some courts) was that the act detaching the territory must apportion the debt, and that it could not be subsequently taken from the old and imposed upon the new county. *Hampshire Co. v. Franklin Co.*, 16 Mass. 75; *Bowdoinham v. Richmond*, 6 Greenl. 93. The better doctrine is that, the power of the legislature to impose the debt of the one county upon another depending upon the existence of a moral obligation from the new county, or the county receiving new territory, to pay part of the old debt, the legislature may so ordain whenever it finds the moral obligation to exist." In *Dunmore's Appeal*, 52 Pa. St. 374, four boroughs were erected in a township which was heavily in debt. By act afterwards passed, the burden of the debt was to be apportioned by commissioner between the boroughs and the township. The supreme court of Pennsylvania upheld the act. In *Layton v. City of New Orleans*, 12 La. Ann. 515, the act of the legislature consolidating several municipalities into one government, known as the "City of New Orleans," provided that the debts of each should be liquidated by taxation upon its own inhabitants. Afterwards, by another act, it was provided that the debts should be paid by taxation uniformly upon all the property of the new city. The court held that the earlier act was not a contract, and no rights vested under it; and that, as in these matters the legislature is supreme, it could change its policy and readjust these debts. In *Mayor, etc., of Baltimore v. State*, 15 Md. 376, the court say: "The doctrine that there is a fundamental principle of right and justice inherent in the nature and spirit of the social compact that rises above and restrains the power of legislation cannot be applied to the legislature when exercising its sovereignty over public charters granted for the purpose of government." Says *Dill. Mun. Corp.* (4th Ed.) § 189: "But upon the division of the old corporation, and the creation of a new corporation out of a part of its inhabitants and territory, or upon the annexation of part of another corporation, the legislature may provide for an equitable apportionment or division of the property, and im-

pose upon the new corporation, or upon the people and territory thus disannexed, the obligation to pay an equitable proportion of the corporate debts. The charters and constituent acts of public and municipal corporations are not, as we have before seen, contracts; and they may be changed at the pleasure of the legislature, subject only to the restraints of special constitutional provisions, if any there be. And it is an ordinary exercise of the legislative dominion over such corporations to provide for their enlargement or division, and, incidental to this, to apportion their property, and direct the manner in which their debts or liabilities shall be met, and by whom. The opinion has been expressed that the partition of the property must be made at the time of the division of or change in the corporation, since, otherwise, the old corporation becomes, under the rule just above stated, the sole owner of the property, and hence cannot be deprived of it by a subsequent act of the legislature. But, in the absence of special constitutional limitations upon the legislature, this view cannot, perhaps, be maintained, as it is inconsistent with the necessary supremacy of the legislature over all its corporate and unincorporate bodies, divisions and parts, and with several well-considered adjudications." To the same general effect are the cases of *Laramie Co. v. Albany Co.*, 92 U. S. 307; *Mount Pleasant v. Beckwith*, 100 U. S. 514; *Seituate v. Weymouth*, 108 Mass. 128; *Willimantic School Soc. v. School Soc. in Windham*, 14 Conn. 457; *Town of Guilford v. Supervisors of Chenango Co.*, 13 N. Y. 143.

In this state the power of the legislature to make such subsequent adjustments was early declared in *People v. Alameda Co.*, 26 Cal. 641. Alameda county was created out of the territory of Contra Costa county in 1853. At the time of the separation, Contra Costa county owed for a bridge which had been constructed upon the territory set apart for Alameda county. The original act made no provision for the payment of this indebted-

ness, which thus remained a charge against the old county. By two separate later acts, the legislature provided for the apportionment of the debt, putting a part of the burden upon Alameda county. These acts were upheld as a proper exercise of legislative power. And, indeed, it is not easy to see how the opposite view can be maintained. Since the legislative power, within constitutional limitations, is supreme in the matter, since, in the first apportionment, the people affected are entitled to no voice (except through their representatives), and since the act of the legislature is not in the nature of a contract, it cannot logically be held that the power has been exhausted by its first exercise. The right still remains to make such future adjustments as the equities may suggest. Nor, in the operation of the act in question upon the city of San Diego, can we perceive any hardship. It had at the time of the segregation \$600,000, acquired while Coronado Beach was a part of its territory, and partially acquired, doubtless, by taxation upon this land. All of this property it retains. All of the moneys evidenced by the bonded indebtedness were expended within its present territorial limits, and no dollar of it went to improve the excluded territory. Having all of the common property and all of the fruits of the common debt, it is certainly not onerous or oppressive that it should be asked to pay for what has been expended for its exclusive benefit. In a certain sense, it is true that Coronado Beach was also benefited by these expenditures. In the same sense, San Mateo county is benefited by the public improvements of the city and county of San Francisco; but it has never been asserted that for such benefits a sister county should be called upon to pay. The judgment and order appealed from are affirmed.

We concur: BEATTY, C. J.; HARRISON, J.; TEMPLE, J.; VAN FLEET, J.; GAROUTTE, J.

RUMSEY v. TOWN OF SAUK CENTRE.

(61 N. W. 330, 59 Minn. 316.)

Supreme Court of Minnesota. Dec. 7, 1894.

Appeal from district court, Stearns county; D. B. Searle, Judge.

Action by Charles F. Rumsey against the town of Sauk Centre, and on motion of defendant the city of Sauk Centre was made a party defendant. From an order overruling a demurrer by the city to the complaint, it appeals. Affirmed.

M. C. Kelsey and Geo. H. Reynolds, for appellant. J. L. Washburn and L. E. Judson, Jr., for respondent.

MITCHELL, J. This action was originally brought against the town of Sauk Centre alone, but subsequently, on motion of the town, neither the plaintiff nor the city objecting, the city of Sauk Centre was made a party defendant, and plaintiff amended his complaint accordingly. The defendant city demurred to the complaint, on the ground that it did not state a cause of action. From an order overruling this demurrer the city appealed. Stated in chronological order, the allegations of the complaint are as follows: The town of Sauk Centre was a duly-organized township in the county of Stearns. The village of Sauk Centre, situated within the town, was organized as an incorporated village under Gen. Laws 1875, c. 139, and Sp. Laws 1876, c. 16, and so continued until the incorporation of the city of Sauk Centre, in 1889. In December, 1882, the town, in pursuance of the provisions of Sp. Laws 1879, c. 143, issued to the Little Falls & Dakota Railroad Company its bonds to the amount of \$12,000, which were afterwards sold and transferred to the plaintiff, and upon which he brings this action.

In 1885 the legislature passed an act (Sp. Laws 1885, c. 296) entitled "An act to provide for the payment of the bonded indebtedness of the town of Sauk Centre incurred by said town by the issue of its bonds prior to the year 1883 and to apportion said indebtedness between the present town of Sauk Centre and the village of Sauk Centre." The provisions of this act were that the bonded indebtedness of the town incurred by the issue of its bonds prior to 1883 should be apportioned and made chargeable to and payable by the town as then constituted, and by the village pro rata in the proportion that the valuation of taxable property of the town and village, respectively, shall bear to the entire valuation of the taxable property of the town and village collectively, said valuation to be determined by the general tax assessment list last preceding the time when the several installments of principal and interest upon such bonds become due and payable; and that

the payment of such proportionate shares thereby apportioned should be provided for, and paid by, and be recoverable against, the town and village, respectively, as they become due, in the same manner as other debts of the town and village, respectively, were by law provided for, made payable and recoverable. In March, 1889, the city of Sauk Centre was incorporated by Sp. Laws, 1889, c. 4. The city included the whole of the village, and 880 acres which were outside the village, but within the town. This act provided that upon the election and qualification of the city officers in April, 1889, the village corporation should cease, and thereupon the city should succeed to, and become vested with and the owner of, all the property and rights of action which belonged to the village, and should be and become liable for all the debts, obligations, and liabilities then existing against the village for any cause or consideration whatever, in the same manner and to the same extent as if originally contracted or incurred by the city.

1. The allegations of the complaint are full to the effect that the bonds were duly issued by the town by virtue of and in accordance with the provisions of Sp. Laws 1879, c. 143. Whether, in case these allegations are untrue, the recitals in the bonds are sufficient to estop the town or city from asserting the fact against a bona fide purchaser for value and before maturity, is a question not here involved, and hence need not be considered.

2. An examination of the acts under which the village was organized will show that, according to the repeated decisions of this court in similar cases, it remained a part of the town for all purposes, except the village purposes provided for in the acts. The property within the village was subject to taxation for the payment of these bonds in the same manner and to the same extent as any other property in the town. *Bradish v. Lucken*, 38 Minn. 186, 36 N. W. 454.

3. Inasmuch as this condition of things still continued, it is not apparent what was the particular necessity for the enactment of the law of 1885. But the meaning and effect of that act are quite clear. It did not and could not affect or change the rights of the holders of the bonds against the town. But, as between themselves, it practically made the village and the remainder of the town two separate and distinct districts as respects liability for and the payment of all outstanding bonds of the village issued prior to 1883, and apportioned this indebtedness between the two in the ratio of the taxable property within their respective limits. Under this act, the village would be liable to the holders of the bonds to the extent of the amount apportioned to it; and, if the town (outside of the village limits) was compelled to pay more than its share, it could have recovered it back from the village. The power of the

legislature to do this is undoubted. The village was a part of the town which issued the bonds. All the property within its limits was liable to taxation for their payment. The part apportioned to the village did not impose any materially greater burden of taxation upon the property within its limits than it was already subject to. The right of the legislature, in all cases not within any constitutional inhibition, to create, alter, divide, or abolish all municipal corporations, and to make such division and apportionment of the corporate property and debts of old corporations, in case of a division of their territory, as the legislature may deem equitable, is well settled. *State v. City of Lake City*, 25 Minn. 404; *City of Winona v. School Dist. No. 82*, 40 Minn. 13, 41 N. W. 539. And it can make no difference whether the legislature divides the old corporation only for a particular purpose or for all purposes. The intention of the act of 1885 to make the village, as a municipal corporation, liable for the designated proportion of the town bonds, is very clear; and, as we construe its provisions, there is no ground for the contention that the holders of the bonds could not recover against the village, but

that it would only be liable over to the town. The fact that the city includes 880 acres more than the village neither alters the law of the case, nor involves any practical difficulty. The liability of the village being established, the liability of the city, as its successor, under the act of 1889, is too clear to require argument. In case the plaintiff establishes his cause of action, he will be entitled to judgment against the town by virtue of its contract for the full amount of the bonds,—and against the city, by virtue of the acts of 1885 and 1889, to the extent of its proportionate share, as fixed by the act of 1885. There is nothing in the point that the act of 1885 violated section 27, art. 4, of the constitution of the state. Neither is there anything in the objection that it is a legislative exercise of judicial power. It does not assume to pass upon the validity of any outstanding bonds of the town. If there are any such which were not a valid indebtedness of the town, that defense is still available to both the town and the city. Order affirmed.

GILFILLAN, C. J., absent on account of sickness; took no part.

MT. PLEASANT v. BECKWITH.

(100 U. S. 514.)

Supreme Court of United States. Oct., 1879.

Appeal from the circuit court of the United States for the Eastern district of Wisconsin.

Mr. L. S. Dixon and Mr. John T. Fish, for appellants. Mr. William P. Lynde, for appellee.

Mr. Justice CLIFFORD delivered the opinion of the court.

Explicit authority from the legislature was given to the supervisors of the town of Racine to subscribe for the stock of the railroad company mentioned in the act conferring the power, to an amount not exceeding \$50,000, provided a majority of the legal voters of the municipality, at a meeting of the town duly called and held for the purpose, shall vote in favor of making the proposed subscription. Sess. Laws Wis. 1853, p. 11.

Pursuant to that authority, the proper officers of the town, on the 6th of December, 1853, subscribed for the capital stock of the railroad company to the amount of \$50,000, and issued one hundred bonds of the corporation, each in the sum of \$500, in payment of the subscription for the stock, the bonds being made payable in twenty years from date, with coupons attached for annual interest at the rate of seven per cent. Twenty of those bonds with their coupons are now held by the complainant, numbered from seventy to eighty-nine, inclusive, and of which he became the lawful holder within one month subsequent to their date,—all of which, as he alleges, remain wholly unpaid, principal and interest.

Various facts and circumstances are alleged in the bill of complaint of an equitable nature, and which the complainant insists are of a character to show that he has no remedy at law, and which tend strongly to show that he is entitled to relief in equity. Appended to those several allegations is the prayer of the complainant, that the three respondents may answer the matters charged, and that the court will ascertain the respective liabilities of the respondents to the complainant, and decree the amount due to him from each of the respondent municipalities, and for general relief.

Service was made, and the respective respondents appeared and separately demurred to the bill of complaint. Hearing was had, and the court overruled the several demurrers and directed that the respondents should answer the matters charged in the bill of complaint by a given day. Separate answers were accordingly filed by the respective respondents, no objection being made that they were not filed in time.

Sufficient appears to show that on the 2d of January, 1838, the town of Racine and the

town of Mt. Pleasant were by the same act created municipal corporations, with boundaries as set forth in the bill of complaint. Laws Wis. 1838, p. 168.

Four years later, the town of Caledonia was incorporated, her territory being taken from the two towns before mentioned, without any provision being made that the new town should bear any portion of the indebtedness of either of the old towns. Priv. Laws 1842, p. 10.

Both parties concur in these propositions, and it appears that the city of Racine, which is a distinct municipality from the town by the same name, was incorporated by the act of the 8th of August, 1848, with boundaries as correctly set forth in the transcript. Id. 1848, p. 80.

Subsequent changes, if any, made in the boundaries of these municipalities, not herein made the subject of comment, are regarded as immaterial in the present investigation.

Additional territory was subsequently taken from the town of Racine and was annexed to the city of Racine, and by a still later act another fraction of her territory was annexed to the town of Mt. Pleasant, neither act containing any regulations as to existing indebtedness. Id. 1856, pp. 148-146.

Prior to that, to wit, on the 6th of March in the same year, the legislature of the state, by an act of that date, annexed a much larger tract, taken from the towns of Racine and Mt. Pleasant, to the city of Racine, as described in the record; but the supreme court of the state decided that a certain feature of the act was unconstitutional and void. *Slauson v. City of Racine*, 13 Wis. 398.

In consequence of that decision, the towns from which the territory annexed was taken continued to exercise jurisdiction over it for the period of fifteen years longer, until a portion of the same territory then constituting a part of the town of Mt. Pleasant was again annexed to the city of Racine, on the condition that the city "shall assume and pay so much of the municipal indebtedness of the town as the lands described in the first section of that act may be or become legally chargeable with and liable to pay." Priv. Laws Wis. 1871, p. 723.

Throughout these several changes, except the last, the annexation in every instance was made without any regulation that the town to which the territory was annexed should pay any portion of the indebtedness of the town from which the territory annexed was taken. Still not satisfied, the legislature, by the act of the 23d of February, 1857, rearranged the boundaries of each of the three towns, as therein is fully set forth and described. Id. 1857, p. 103.

Two years later, the county supervisors changed the name of the town of Racine to Orwell; but the prior name will be used throughout in this opinion, as less likely to

produce confusion in the statement of facts. From the time the legislature rearranged the boundaries of the three towns they remained without alteration until the legislature, March 30, 1860, by a public act, vacated and extinguished the corporation and body politic known as the town of Racine, then called Orwell, and enacted that thereafter it should have no existence as a body politic and corporate. Sess. Laws Wis. 1860, p. 218.

Section 2 of the act also provided that all that part of the territory of the town lying north of the described line should be annexed to and hereafter form a part of the town of Caledonia, and that all that part of the territory lying south of that line should become and continue to be a part of Mt. Pleasant.

Each of the respondent towns refers in their answer to the legislation of the state in respect to their incorporation and boundaries, which need not be reproduced, as they are accurately set forth in the preceding statement.

Two of the respondents, to wit, the town of Mt. Pleasant and the town of Caledonia, deny in their answers that any statute of the state has ever been passed which would authorize the municipal authorities of those towns to levy and collect a tax to pay either the principal or interest of the bonds described in the bill of complaint, and allege that the corporate authorities of those towns have never assumed or undertaken any trust or duty in the premises, or have ever, in any way, recognized the acts of the town which issued the bonds or the validity of the same. Nor does the answer of the other respondent, to wit, the city of Racine, differ very materially from those filed by the two towns first named, except that the pleader avers that the city was only made liable for such portion of the indebtedness of the old town as is described in the act enlarging the limits of the respondent city, and pleads as a separate defence that the complainant has an adequate remedy at law.

Replications were filed by the complainant, and the parties entered into a stipulation that the proofs should be taken by the master, and that they might be read and used at the final hearing as the evidence in the case, subject to legal objection. Proofs were accordingly taken by the master, and he reported the depositions of the witnesses examined, with an agreed statement of facts. Arguments of counsel followed, and the circuit court entered a decree in favor of the complainant against each respondent.

Two of the towns, to wit, Mt. Pleasant and Caledonia, appealed to this court, and assign for error the following causes: (1) That the circuit court erred in holding that the appellants are liable to pay the debt of the town of Racine incurred in the purchase of stock in the aforesaid railroad company, or that the debt of that town became the debt of the appellants, to be enforced against them in

any form of proceeding. (2) That the circuit court erred in holding that the property of the individuals within the jurisdiction of that town constituted the primary fund to which the complainant had the right to look for the payment of his debt, and that the transfer of their property to the jurisdiction of the appellants rendered them liable to pay the debts due to the creditors of the town whose powers and jurisdiction terminated by the transfer. (3) That the circuit court erred in holding that the power of taxation previously vested in the town which issued the bonds in question was, by the act annexing its territory to the appellant towns, transferred to the appellants to be severally exercised by them upon all the taxable property within their respective jurisdictions. (4) That the circuit court erred in holding that it had jurisdiction in equity of the case, or that the appellants are in equity and good conscience liable to pay the claim of the complainant against the town whose territory was annexed to the appellant corporations.

Counties, cities, and towns are municipal corporations created by the authority of the legislature, and they derive all their powers from the source of their creation, except where the constitution of the state otherwise provides. They have no inherent jurisdiction to make laws or to adopt governmental regulations, nor can they exercise any other powers in that regard than such as are expressly or impliedly derived from their charters or other statutes of the state.

Corporations of the kind are composed of all the inhabitants of the territory included within the political organization, each individual being entitled to participate in its proceedings; but the powers of the organization may be modified or taken away at the mere will of the legislature, according to its own views of public convenience, and without any necessity for the consent of those composing the body politic. Corporate rights and privileges are usually possessed by such municipalities; and it is equally true that they are subject to certain legal obligations and duties, which may be increased or diminished at the pleasure of the legislature, from which all their powers are derived.

Institutions of the kind, whether called cities, towns, or counties, are the auxiliaries of the state in the important business of municipal rule; but they cannot have the least pretension to sustain their privileges or their existence upon any thing like a contract between themselves and the legislature of the state, because there is not and cannot be any reciprocity of stipulation between the parties, and for the further reason that their objects and duties are utterly incompatible with every thing partaking of the nature of compact.

Instead of that, the constant practice is to divide large municipalities and to con-

solidate small ones, or set off portions of territory from one and annex it to another, to meet the wishes of the residents or to promote the public interests as understood by the legislature,—it being everywhere understood that the legislature possesses the power to make such alterations and to apportion the common property and burdens as to them may seem just and equitable.

Alterations of the kind are often required to promote the public interests or the convenience and necessities of the inhabitants; and the public history shows that it has been the constant usage in the states to enlarge or diminish the power of towns, to divide their territory by set-off and annexation, and to make new towns whenever the legislature deems it just and proper that such a change should be made. Old towns may be divided and new ones incorporated out of parts of the territory of those previously organized; and in enacting such regulations the legislature may apportion the common property and the common burdens, and may, as between the parties in interest, settle all the terms and conditions of the division of their territory, or the alteration of the boundaries, as fixed by any prior law.

State legislation may regulate the subject; but if the legislature omits to do so, the presumption, as between the parties, is that they did not consider that any regulation was necessary. Where none is made, in case of division the old corporation owns all the public property within her new limits, and is responsible for all the debts of the corporation contracted before the act of separation was passed. Debts previously contracted must be paid entirely by the old corporation, nor has the new municipality any claim to any portion of the public property, except what falls within her boundaries, and to that the old corporation has no claim whatever. *Laramie Co. v. Albany Co.*, 92 U. S. 307; *Bristol v. New Chester*, 3 N. H. 521.

Apply these principles to the admitted facts of the case, and it is clear that every one of the described changes made in the limits and boundaries of the respondent municipalities become wholly immaterial in this investigation, except the last two, as hereafter more fully explained.

Before the passage of those two acts, the claim of the complainant against the town of Racine was, beyond all question, valid and collectible. Nobody controverts that proposition, and it is clear that no defence to the action could have been sustained for a moment. By the act of March 30, 1860, the legislature of the state vacated and extinguished the corporation and body politic formerly known as Racine, then called Orwell, and annexed the whole area of the territory included in the municipality to the two adjacent towns of Mt. Pleasant and Caledonia, in the proportions and by the boundary lines described in the second section of the

legislative act. Had legislation stopped there, it is clear that the city of Racine would not have been liable for any portion of the debt of the extinguished municipal corporation; but it did not stop there, as appears by what follows.

Prior to the passage of that act, the old town of Racine was the sole obligor in the bonds held by the complainant; and there certainly is nothing in the provisions of that act which tends in the least degree to create any liability on the part of any other municipality for the indebtedness of that town, except the towns of Mt. Pleasant and Caledonia. Nothing had previously occurred to create any liability on the part of the city of Racine to pay any proportion of the debts of the old town of Racine, which issued the bonds described in the bill of complaint.

Until the passage of the act of the 17th of March, 1871, the rights of all parties remained unchanged. By that act a portion of the territory formerly belonging to the old town of Racine was set off from the town of Mt. Pleasant and was annexed to the city of Racine. Appended to that act, and a part of it, was the provision that the city to which the described territory was annexed "shall assume and pay so much of the indebtedness of the town of Racine as the lands described in the first section of the act may be or become legally chargeable with and liable to pay." *Priv. Laws Wis. 1871*, p. 723.

Enough appears in that provision of direct legislation to show that the city of Racine was thereby made liable for the debts of the extinguished town of Racine in the proportion therein described; and the clear inference from the provision is that the town of Mt. Pleasant, prior to the passage of that act, was liable for the debts of that old municipality in proportion to the whole extent of the territory annexed to her by the prior act which extinguished the old municipal corporation. None, it is presumed, will deny the liability of the city of Racine for those debts in the proportion described in the act creating the liability, and hence it is that the corporate authorities of the city acquiesced in the decree of the circuit court without appeal.

Parties who do not appeal from the final decree of the circuit court cannot be heard in opposition to the same when the case is regularly brought here by other proper parties. They may be heard in support of the decree and in opposition to every assignment of error, but they cannot be heard to show that the decree below was erroneous. *The Stephen Morgan*, 94 U. S. 599.

Concede that, and it follows that the only question open in the case for examination is whether the other two respondent municipal corporations are liable to any extent for the debts of the extinguished municipality, portions of whose territory were transferred

by the legislature into their respective jurisdictions. We say, liable to any extent, because the question of amount was submitted to the master, and the record shows that neither of the appellants excepted to the master's report. *Gordon v. Lewis*, 2 Summ. 143, Fed. Cas. No. 5,613; *McMicken v. Perin*, 18 How. 507. Nor do either of the assignments of error allege that the master committed any error in that regard. *Brockett v. Brockett*, 3 How. 691.

Viewed in that light, as the case should be, it is clear that if the appellants are liable at all they are liable for the respective amounts specified in the decree. *Harding v. Handy*, 11 Wheat. 103; *Story v. Livingston*, 13 Pet. 359.

Where one town is by a legislative act merged in two others, it would doubtless be competent for the legislature to regulate the rights, duties, and obligations of the two towns whose limits are thus enlarged; but if that is not done, that it must follow that the two towns succeed to all the public property and immunities of the extinguished municipality. *Morgan v. City and Town of Beloit*, 7 Wall. 613, 617.

It is not the case where the legislature creates a new town out of a part of the territory of an old one, without making provision for the payment of the debts antecedently contracted, as in that case it is settled law that the old corporation retains all the public property not included within the limits of the new municipality, and is liable for all the debts contracted by her before the act of separation was passed. *Town of Depere v. Town of Bellevue*, 31 Wis. 120, 125.

Instead of that, it is the case where the charter of one corporation is vacated and rendered null, the whole of its territory being annexed to two others. In such a case, if no legislative arrangements are made, the effect of the annulment and annexation will be that the two enlarged corporations will be entitled to all the public property and immunities of the one that ceases to exist, and that they will become liable for all the legal debts contracted by her prior to the time when the annexation is carried into operation.

Speaking to the same point, the supreme court of Missouri held that where one corporation goes entirely out of existence by being annexed to or merged in another, if no arrangements are made respecting the property and liabilities of the corporation that ceases to exist, the subsisting corporation will be entitled to all the property and be answerable for all the liabilities. *Thompson v. Abbott*, 61 Mo. 176, 177.

Grant that, and it follows that when the corporation first named ceases to exist there is then no power left to control in its behalf any of its funds, or to pay off any of its indebtedness. Its property passes into the hands of its successor, and when the benefits are taken the burdens are assumed,

the rule being that the successor who takes the benefits must take the same cum onere, and that the successor town is thereby estopped to deny that she is liable to respond for the attendant burdens. *Swain v. Seamens*, 9 Wall. 254, 274; *Pickard v. Sears*, 6 Adol. & E. 474.

Powers of a defined character are usually granted to a municipal corporation, but that does not prevent the legislature from exercising unlimited control over their charters. It still has authority to amend their charters, enlarge or diminish their powers, extend or limit their boundaries, consolidate two or more into one, overrule their legislative action whenever it is deemed unwise, impolitic, or unjust, and even abolish them altogether, in the legislative discretion, and substitute in their place those which are different. *Cooley, Const. Lim.* (4th Ed.) 232.

Municipal corporations, says Mr. Justice Field, so far as they are invested with subordinate legislative powers for local purposes, are mere instrumentalities of the state for the convenient administration of their affairs; but when authorized to take stock in a railroad company, and issue their obligations in payment of the stock, they are to that extent to be deemed private corporations, and their obligations are secured by all the guaranties which protect the engagements of private individuals. *Broughton v. Pensacola*, 93 U. S. 266, 269.

Modifications of their boundaries may be made, or their names may be changed, or one may be merged in another, or they may be divided and the moieties of their territory may be annexed to others; but in all these cases, if the extinguished municipality owes outstanding debts, it will be presumed in every such case that the legislature intended that the liabilities as well as the rights of property of the corporation which thereby ceases to exist shall accompany the territory and property into the jurisdiction to which the territory is annexed. *Colechester v. Seaber*, 3 Burrows, 1866.

Neither argument nor authority is necessary to prove that a state legislature cannot pass a valid law impairing the obligations of a contract, as that general proposition is universally admitted. Contracts under the constitution are as sacred as the constitution that protects them from infraction, and yet the defence in this case, if sustained, will establish the proposition that the effect of state legislation may be such as to deprive a party of all means of sustaining an action of any kind for their enforcement. Cases, doubtless, may arise when the party cannot collect what is due under the contract; but he ought always to be able by some proper action to reduce his contract to judgment.

Suppose it be admitted that the act of the state legislature annulling the charter of the municipality indebted to the complainant, without making any provision for the payment of outstanding indebtedness, was unconstitutional and void, still it must be admitted that the very act which annulled that charter annexed

all the territory and property of the municipality to the two appellant towns, and that they acquired with that the same power of taxation over the residents and their estates that they previously possessed over the estates of the inhabitants resident within their limits before their boundaries were enlarged.

Extinguished municipal corporations neither own property, nor have they any power to levy taxes to pay debts. Whatever power the extinguished municipality had to levy taxes when the act passed annulling her charter terminated, and from the moment the annexation of her territory was made to the appellant towns, the power to tax the property transferred, and the inhabitants residing on it, became vested in the proper authorities of the towns to which the territory and jurisdiction were by that act transferred; from which it follows that for all practical purposes the complainant was left without judicial remedy to enforce the collection of the bonds or to recover judgment for the amounts they represent.

When the appellant towns accepted the annexation, their authorities knew, or ought to have known, that the extinguished municipality owed debts, and that the act effecting the annexation made no provision for their payment. They had no right to assume that the annulment of the charter of the old town would have the effect to discharge its indebtedness, or to impair the obligation of the contract held by its creditors to enforce the same against those holding the territory and jurisdiction by the authority from the legislature and the public property and the power of taxation previously held and enjoyed by the extinguished municipality.

Express provision was made by the act annulling the charter of the debtor municipality for annexing its territory to the appellant towns; and, when the annexation became complete, the power of taxation previously vested in the inhabitants of the annexed territory as a separate municipality ceased to exist, whether to pay debts or for any other purpose,—the reason being that the power, so far as respected its future exercise, was transferred with the territory and the jurisdiction over its inhabitants to the appellant towns, as enlarged by the annexed territory; from which it follows, unless it be held that the extinguishment of the debtor municipality discharged its debts without payment, which the constitution forbids, that the appellant towns assumed each a proportionate share of the outstanding obligations of the debtor town when they acquired the territory, public property, and municipal jurisdiction over every thing belonging to the extinguished municipality.

Corporations of a municipal character, such as towns, are usually organized in this country by special acts or pursuant to some general state law; and it is clear that their powers and duties differ in some important particulars from the towns which existed in the parent country before the Revolution, where they were created by special charters from the

crown, and acquired many of their privileges by prescription, without any aid from parliament. Corporate franchises of the kind granted during that period partook much more largely of the nature of private corporations than do the municipalities created in this country, and known as towns, cities, and counties. Power exists here in the legislature, not only to fix the boundaries of such a municipality when incorporated, but to enlarge or diminish the same subsequently, without the consent of the residents, by annexation or set-off, unless restrained by the constitution, even against the remonstrance of every property holder and voter within the limits of the original municipality.

Property set off or annexed may be benefited or burdened by the change, and the liability of the residents to taxation may be increased or diminished; but the question, in every case, is entirely within the control of the legislature, and, if no provision is made, every one must submit to the will of the state, as expressed through the legislative department. Inconvenience will be suffered by some, while others will be greatly benefited in that regard by the change. Nor is it any objection to the exercise of the power that the property annexed or set off will be subjected to increased taxation, or that the town from which it is taken or to which it is annexed will be benefited or prejudiced, unless the constitution prohibits the change, since it is a matter, in the absence of constitutional restriction, which belongs wholly to the legislature to determine. Courts everywhere in this country hold that, in the division of towns, the legislature may apportion the burdens between the two, and may determine the proportion to be borne by each. *Sill v. Village of Corning*, 15 N. Y. 297; *Mayor, etc., of City of Baltimore v. State*, 15 Md. 376; *City of Olney v. Harvey*, 50 Ill. 453; *Borough of Dunsmore's Appeal*, 52 Pa. St. 374.

Public property and the subordinate rights of a municipal corporation are within the control of the legislature; and it is held to be settled law that, where two separate towns are created out of one, each, in the absence of any statutory regulation, is entitled to hold in severalty the public property of the old corporation which falls within its limits. *North Hempsted v. Hempsted*, 2 Wend. 109; *Hartford Bridge Co. v. East, Hartford*, 16 Conn. 149, 171.

Extensive powers in that regard are doubtless possessed by the legislature; but the constitution provides that no state shall pass any "law impairing the obligation of contracts," from which it follows that the legislature, in the exercise of any such power, cannot pass any valid law impairing the right of existing creditors of the old municipality. 1 Dill. Mun. Corp. (2d Ed.) § 41; *Van Hoffman v. City of Quincy*, 4 Wall. 535, 554; *Lee County v. Rogers*, 7 Wall. 181, 184; *Butz v. City of Muscatine*, 8 Wall. 575, 583; *Furman v. Nichol*, Id. 44, 62.

Where a municipal corporation has the power

to contract a debt, it has, says Dixon, C. J., by necessary implication, authority to resort to the usual mode of raising money to pay it, which undoubtedly is taxation. *State v. City of Milwaukee*, 25 Wis. 122, 133.

Whenever the charter of a city, at the time of the issue of bonds, made it the duty of the city authorities to levy and collect the amount, when reduced to judgment, like other city charges, the same court held that a subsequent act of the legislature prohibiting the city from levying such a tax would be repugnant to the constitution. *Soutter v. City of Madison*, 15 Wis. 30.

State control over the division of the territory of the state into cities, towns, and districts, unless restricted by some constitutional limitation, is supreme, but the same court admits that it cannot be exercised to annul another regulation of the constitution. *Chandler v. Boston*, 112 Mass. 200; *Opinion of the Justices*, 6 Cush. 580.

Cities or towns, whenever they engage in transactions not public in their nature, act under the same pecuniary responsibility as individuals, and are as much bound by their engagements as are private persons, nor is it in the power of the legislature to authorize them to violate their contracts. *Western Sav. Fund Soc. v. City of Philadelphia*, 31 Pa. St. 175, 185.

Text-writers concede almost unlimited power to the state legislatures in respect to the division of towns and the alteration of their boundaries, but they all agree that in the exercise of these powers they cannot defeat the rights of creditors nor impair the obligation of a valid contract. 1 Dill. Mun. Corp. § 128; *Blanchard v. Bissell*, 11 Ohio St. 96; U. S. v. *Treasurer of Muscatine Co.*, 1 Dill. 522, 528, Fed. Cas. No. 16,538.

Concessions of power to municipal corporations are of high importance; but they are not contracts, and consequently are subject to legislative control without limitation, unless the legislature oversteps the limits of the constitution. *Layton v. New Orleans*, 12 La. Ann. 515.

Bonds having been issued and used by a city for purchasing land for a park, which was pledged for the payment of the bonds, held, that a subsequent act of the legislature authorizing a sale of a portion of the park, free of all liens existing by virtue of the original act, was in violation of the federal constitution, as impairing the obligation of contracts. *Commissioners v. Armstrong*, 45 N. Y. 234, 247.

Laws passed by a state impairing the obligation of a contract are void, and if a state cannot pass such a law, it follows that no agency can do so which acts under the state with delegated authority. *Cooley*, Const. Lim. (4th Ed.) 241; *Ang. & A. Corp.* (9th Ed.) §§ 332, 333.

Municipal debts cannot be paid by an act of the legislature annulling the charter of the municipality, and, if not, then the creditors of such a political division must have some remedy after the annulment takes place. With-

out officers, or the power of electing such agents, a municipal corporation, if it can be so called, would be an entity very difficult to be subjected to judicial process or to legal responsibility; but when the entity itself is extinguished, and the inhabitants with its territory and other property are transferred to other municipalities, the suggestion that creditors may pursue their remedy against the original contracting party is little less than a mockery. Public property, with the inhabitants and their estates, and the power of taxation, having been transferred by the authority of the legislature to the appellants, the principles of equity and good conscience require that inasmuch as they are, and have been for nearly twenty years, in the enjoyment of the benefits resulting from the annexation, they shall in due proportions also bear the burdens. *New Orleans v. Clark*, 95 U. S. 644, 654.

Equitable rules of decision are sufficiently comprehensive in their reach to do justice between parties litigant, and to overcome every difficulty which can be suggested in this case. States are divided and subdivided into such municipalities, called counties, cities, towns, and school districts, and the legislature of every state is required every year to pass laws modifying their charters and enlarging or diminishing their boundaries. Nor are the questions presented in this case either new in principle or difficult of application. New forms are given to such charters in every day's experience, when the limits of an old corporation are changed by annexation of new territory, or portions of the territory of the old municipality are set off and annexed to another town. Both corporations in such a case continue, though it may be that the charters are much changed, and that the inhabitants of the territory annexed or set off fall under different officers and new and very diverse regulations. *Beckwith v. City of Racine*, 7 Biss. 142, 149, Fed. Cas. No. 1,213.

Pecuniary burdens may be increased or diminished by the change; but, in the absence of express provisions regulating the subject, it will be presumed in every case where both municipalities are continued, that the outstanding liabilities of the same remain unaffected by such legislation. Unlike that in this case, the charter of the old town was vacated and annulled, from which it follows that the same principles of justice require that the appellant towns, to which the territory, property, and inhabitants of the annulled municipality were annexed, should become liable for its outstanding indebtedness.

Decree affirmed.

Mr. Justice MILLER, with whom concurred Mr. Justice FIELD and Mr. Justice BRADLEY, dissenting:

I am of opinion that it requires legislation to make a legal obligation against the new town, and make the apportionment of the debt; and I dissent on that ground from the judgment and opinion of the court in this case.

MARQUIS v. CITY OF SANTA ANA. (No. 19,380.)

(37 Pac. 650, 103 Cal. 661.)

Supreme Court of California. Sept. 1, 1894.

Department 1. Appeal from superior court, Orange county; J. W. Towner, Judge.

Action by W. H. Marquis against the city of Santa Ana for salary as assessor. Judgment for plaintiff. Defendant appeals. Affirmed.

West & Heathman, for appellant. Jas. G. Scarborough, for respondent.

* * * * *

HARRISON, J.¹ 2. Section 755 of the municipal government act (St. 1883, p. 251) provides: "The clerk, treasurer, assessor, marshal, city attorney and recorder shall severally receive at stated times a compensation to be fixed by ordinance by the board of trustees, which compensation shall not be increased or diminished after their election, or during their several terms of office." The power of the legislature to abolish the office of city treasurer, or to change the compensation of the officer, or its power to authorize the city to change his compensation during his term of office, is not presented in the present case, as the legislature has neither abolished the office, nor changed the compensation, nor given to the city the authority to make such change. As the power of the defendant to fix or change the salary of its officers rests entirely upon statute, the exercise of this power is subject to all the limitations contained in the statute. The plaintiff was elected to the office of city assessor after the adoption of the ordinance fixing the amount of his salary, and the limitation in the above section that his compensation shall not be increased or diminished during his term of office renders the act of the defendant repealing the ordinance fixing his salary nugatory. As the defendant could not directly, by express ordinance for that purpose, diminish the amount of his salary, the same result could not be accomplished by it indirectly, either by accepting the provisions of the act of March 2, 1891, or by doing away with the necessity for his services through its adoption of the ordinance abolishing the street poll tax. The right of an officer to the salary fixed by law for that office is not impaired by any change that may be made in the duties of the office, or even by an entire cessation of those duties, so long as the office itself remains in existence.

3. It is urged by the appellant that its election to avail itself of the provisions of the act of March 2, 1891, had the effect to abolish the office of city assessor. As the office is, however, created by the legislature, it could not be directly abolished by

the city; much less could its abolition be implied from any act that did not in terms purport to abolish it. The office is provided for in section 752 of the municipal government act, which has never been repealed; and the act of March 2, 1891, instead of sustaining the suggestion of an implied repeal of that section, expressly declares that its provisions shall not be given force in any city until it shall have passed an ordinance electing to avail itself thereof, on or before the first Monday in March of each year, thus implying that the office continues to exist. The duties of the city assessor are fixed by section 787 of the municipal government act; and while it may be conceded that the election by the defendant to avail itself of the provisions of the act of March 2, 1891, did away with the necessity for the performance by the assessor of any acts connected with the assessment of property, theretofore imposed upon him, so long as such election remained in force, it does not follow that the office of assessor was thereby abolished. Section 787 prescribes as one of the duties of this office that "the assessor shall during said term also make a list of all male persons residing within the limits of such city over the age of twenty-one years, and shall verify said list by his oath, and shall on or before the first Monday of August in each year deposit the same with the city clerk." It is urged by the defendant that, inasmuch as the only apparent object for which this list is to be made is to form the basis for collecting an annual street poll tax, the repeal of the ordinance providing for the street poll tax relieved the plaintiff from the duty of preparing this list. The statute, however, under which he holds his office, makes the preparation of this list one of his official duties; and we are not at liberty to assume that the only object of this requirement was to enable the city to collect a street poll tax, or that he would be justified in omitting this official duty prescribed by the statute, even though the city, by its ordinance, rendered his act in preparing it of no avail to it. The city had still the power to pass an ordinance imposing this tax, and might then avail itself of the list thus prepared; but, whether the duties have been increased or diminished, or entirely dispensed with, so long as the office remains, the salary affixed thereto is an incident of the office, and must be paid to the incumbent. We have, however, seen that the office has not been abolished; and the defendant does not contend that, if the office is still in existence, the respondent is not its incumbent. It follows that he is entitled to the salary attached to the office at the time of his election, and that the action of the court in holding this defense to be unavailing was correct. The judgment is affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

¹ Part of the opinion is omitted.

HALL v. STATE OF WISCONSIN.

(103 U. S. 5.)

Supreme Court of United States. Oct., 1880.

Error to the supreme court of the state of Wisconsin.

Mr. Luther S. Dixon, for plaintiff in error.

Mr. Justice SWAYNE delivered the opinion of the court.

This is a writ of error to the supreme court of Wisconsin. The case we are called on to consider is thus disclosed in the record:

By an act of the legislature entitled "An act to provide for a geological, mineralogical, and agricultural survey of the state," approved March 3, 1857, James Hall, of the state of New York, the plaintiff in error, and Ezra Carr and Edward Daniels, of Wisconsin, were appointed "commissioners" to make the survey. Their duties were specifically defined, and were all of a scientific character.

They were required to distribute the functions of their work by agreement among themselves, and to employ such assistants as a majority of them might deem necessary.

The governor was required "to make a written contract with each commissioner" for the performance of his allotted work, and "the compensation therefor, including the charge of each commissioner"; and it was declared that "such contract shall expressly provide that the compensation to such commissioners shall be at a certain rate per annum, to be agreed upon, and not exceeding the rate of two thousand dollars per annum, and that payment will be made only for such part of the year as such commissioner may actually be engaged in the discharge of his duty as such commissioner."

In case of a vacancy occurring in the commission, the governor was empowered to fill it, and he was authorized to "remove any member for incompetency or neglect of duty."

To carry out the provisions of the act, the sum of \$6,000 per annum for six years was appropriated, "to be paid to the persons entitled to receive the same."

By an act of the legislature of April 2, 1860, Hall was made the principal of the commission, and was vested with the general supervision and control of the survey. He was required to contract with J. D. Whitney and with Charles Whittlesey for the completion within the year of their respective surveys. To carry into effect these provisions, the governor was authorized to draw such portion of the original appropriation, not drawn previous to the 29th of May, 1858, as might be necessary for that purpose, the residue to be otherwise used as directed.

By a subsequent act of March 21, 1862, both the acts before mentioned were repealed without qualification.

On the 29th of May, 1858, Hall entered into a contract with the governor, whereby it was stipulated on his part that he should perform the duties therein mentioned touching the

survey, "this contract to continue till the third day of March, 1863, unless the said Hall should be removed for incompetency or neglect of duty, * * * or unless a vacancy shall occur in his office by his own act or default."

On the part of the state it was stipulated "that the said Hall shall receive for his compensation and expenses, including the expense of his department of said survey, at the rate of \$2,000 per annum: * * * provided, that for such time as said Hall or his assistants shall not be engaged in the prosecution of his duties, according to the terms of said act and of this contract, deduction shall be made, pro rata, from the sum of his annual compensation and expenses."

Hall brought this action upon the contract. The declaration avers that immediately after the execution of the contract he entered upon the performance of the duties thereby enjoined upon him, and continued in their faithful performance until the time specified in the contract for its expiration, to wit, the 3d of March, 1863; that he was not removed by the governor for incompetency or neglect, nor was any complaint ever made by the governor against him; that he never at any time, directly or indirectly, assented to the repeal of the acts of 1857 and 1860; and that thereafter he continued in the performance of his labors the same as before, and that for the year ending March 3, 1863, he devoted his whole time and skill, without cessation, to the work.

He avers, further, that for his services performed prior to March 3, 1862, he was fully paid, but that for the year ending March 3, 1863, he had received nothing; that payment was demanded and refused on the 3d of December, 1863; and that the defendant is therefore justly indebted to him in the sum of \$2,000, with interest from the date last mentioned.

He avers, finally, that on the 30th of January, 1875, he presented his claim to the legislature by a proper memorial, and that its allowance was refused.

The state demurred upon two grounds:

- (1) That the complaint did not show facts sufficient to constitute a cause of action.
- (2) That it appeared upon the face of the complaint that the cause of action did not accrue within six years before the commencement of the action.

In support of the first objection, it was insisted that the employment of the plaintiff was an office, and that the legislature had therefore the right to abolish it at pleasure. For the plaintiff, it was maintained that there was a contract, and that the repealing act impaired its obligation in violation of the contract clause of the constitution of the United States.

The court sustained the demurrer upon the first ground, and, the plaintiff declining to amend, dismissed his petition. The opinion of the court is limited to the first point, and ours will be confined to that subject. The whole case resolves itself into the issue thus raised by the parties.

No question is made as to the suabily of the

state. The proceeding is authorized by a local statute. The question raised by the record is within our jurisdiction. In the exercise of that jurisdiction in such cases this court is unfettered by the authority of state adjudications. It acts independently, and is governed by its own views. *Township of Pine Grove v. Talcott*, 19 Wall. 666.

The question to be considered was before us in *U. S. v. Hartwell*, 6 Wall. 385. It was there said that "an office is a public station or employment conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties. * * * A government office is different from a government contract. The latter, from its nature, is necessarily limited in its duration and specific in its objects. The terms agreed upon define the rights and obligations of both parties, and neither may depart from them without the assent of the other."

In *U. S. v. Maurice*, 2 Brock. 96, Fed. Cas. No. 15,747, Mr. Chief Justice Marshall said: "Although an office is an employment, it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to perform a service without becoming an officer."

The case before us comes within the definition we have taken from *U. S. v. Hartwell*, supra.

The statute under which the governor acted was explicit, that he should "make a written contract with each of the commissioners aforesaid, expressly stipulating and setting forth the nature and extent of the services to be rendered by each, and the compensation therefor," and that "such contract" should expressly provide that the compensation of each commissioner should be at a certain rate per annum, to be agreed upon, and not exceeding \$2,000 per annum for the time such commissioner may be actually engaged.

The action of the governor conformed to this view. The instrument executed pursuant to the statute recites that it is an "agreement" between the governor as one party, and Hall, Carr, and Randall, the commissioners, as the other. They severally agreed to do what the statute contemplated, and he agreed to pay all that it permitted.

The names and seals of the parties were affixed to the agreement, and its execution was attested by two subscribing witnesses, as in other cases of contract.

Where an office is created, the law usually fixes the compensation, prescribes its duties, and requires that the appointee shall give a bond with sureties for the faithful performance of the service required. To do all this, if the employment were an office, by a contract with the officer and without his bond would, to say the least, be a singular anomaly.

The acts of 1857 and 1860 both speak of Hall as "of Albany, N. Y." He was not, therefore, a citizen or a resident of the state of Wisconsin.

It is well settled in Wisconsin that such a

person cannot be a public officer of that state. *State v. Smith*, 14 Wis. 497; *State v. Murray*, 28 Wis. 96.

In *U. S. v. Hatch*, the supreme court of Wisconsin decided that the term "civil officers" as used in the organic law (act of congress of April 20, 1836) embraces only those officers in whom a portion of the sovereignty is vested, or to whom the enforcement of municipal regulations or the control of the general interests of society is confided, and does not include such officers as canal commissioners. 1 Pin. 182.

In *Butler v. Regents of the University*, 32 Wis. 124, the same court held, without dissent, that a professor in the state university, appointed for a stated term with a fixed salary, was not a public officer in such a sense as prevented his employment from creating a contract relation between himself and the regents.

It is hard to distinguish that case in principle from the one before us.

In a sound view of the subject it seems to us that the legal position of the plaintiff in error was not materially different from that of parties who, pursuant to law, enter into stipulations limited in point of time, with a state, for the erection, alteration, or repair of public buildings, or to supply the officers or employes who occupy them with fuel, light, stationery, and other things necessary for the public service. The same reasoning is applicable to the countless employes in the same way, under the national government.

It would be a novel and startling doctrine to all these classes of persons that the government might discard them at pleasure, because their respective employments were public offices, and hence without the protection of contract rights.

It is not to be supposed that the plaintiff in error would have turned his back upon like employment, actual or potential, elsewhere, and have stipulated as he did to serve the state of Wisconsin for the period named, if the idea had been present to his mind that the state had the reserved power to break the relation between them whenever it might choose to do so. Nor is there anything tending to show that those who acted in behalf of the state had any such view at that time. All the facts disclosed point to the opposite conclusion as to both parties.

Undoubtedly, as a general proposition, a state may abolish any public office created by a public law (*Newton v. Commissioners*, 100 U. S. 559), but even with respect to those offices the circumstances may be such as to create an exception. In *Trustees of Dartmouth College v. Woodward*, Mr. Justice Story said: "It is admitted that the state legislatures have power to enlarge, repeal, and limit the authorities of public officers in their official capacities, in all cases where the constitutions of the states respectively do not prohibit them; and this, among others, for the very reason that there is no express or implied contract that they shall always, during their continuance in office, exercise such authorities. * * * But when the

legislature makes a contract with a public officer, as in case of a stipulated salary for his services during a limited period, this, during the limited period, is just as much a contract, within the purview of the constitutional prohibition, as a like contract would be between two private citizens." 4 Wheat. 518, 694.

When a state descends from the plane of its sovereignty, and contracts with private persons, it is regarded *pro hac vice* as a private person itself, and is bound accordingly. Davis v. Gray, 16 Wall. 203.

The general government has no powers but such as are given to it expressly or by implication.

The states and their legislatures have all such as have not been surrendered or prohibited to them. *Gilman v. Philadelphia*, 3 Wall. 713. And see, also, 2 Greenl. Cruise, 67.

That the laws under which the governor acted, if valid, gave him the power to do all he did, is not denied. We will not, therefore, dwell upon that point. The validity of those laws is too clear to admit of doubt. It would be a waste of time to discuss the subject.

We are of the opinion that the supreme court of the state erred in the judgment given. It will therefore be reversed, and the case remanded for further proceedings in conformity with this opinion. So ordered.

STATE ex rel. KUHLMAN v. ROST, Judge,
et al. (No. 11,599.)

(16 South, 776, 47 La. Ann. 53.)

Supreme Court of Louisiana. Jan. 2, 1895.

Application by B. J. Kuhlman for a writ of prohibition forbidding Emile Rost, judge of the Twenty-First judicial district court, to take cognizance of a cause, and forbidding L. A. Cambre from prosecuting a writ of injunction enjoining the relator from performing the duties of a police juror. Writ allowed.

Hamilton N. Gautier, J. L. Gaudet, and E. Howard McCaleb, for relator. Gustave V. Soniat, for respondents.

NICHOLLS, C. J. The relator in this case avers that he has been duly appointed and qualified as police juror for the parish of St. Charles, as would appear by an annexed commission and oath; that since qualifying as aforesaid he has held said office, performed all the duties thereof, and is the present legal incumbent in the actual possession of said office, and is entitled to continue in the possession thereof, to the exclusion of all other persons; that he is in reality an officer de jure et de facto, and no court is competent to enjoin and prohibit him from performing the duties of his said office as long as he remains in possession as aforesaid; that on or about the 17th day of October, 1894, one L. A. Cambre, alleging and representing that he had been illegally removed from said office of police juror, and that relator was the unlawful, though commissioned and qualified, incumbent, in full possession of said office, performing the duties thereof, obtained from the judge of the Twenty-First judicial district court for St. Charles parish, on such ex parte showing, a mandatory writ of injunction, prohibiting relator from in any manner performing the duties of his said office, or attending the meetings of said police jury, until such time as the title to said office should have been judicially determined, thus practically ousting relator from office without judicial determination of relator's right to his possession of said office; that said Cambre has not, nor has any person, judicially claimed the said office adversely to relator; that relator appeared before the judge, and in open court excepted to his jurisdiction, and moved the court to dissolve the injunction, and to revoke the order granting the same, upon the ground that the said judge was incompetent, and the court without jurisdiction, *ratione materiae*, to so enjoin relator, admittedly an officer de facto; that said judge and court persist in usurping jurisdiction, and refuse to revoke the said order, and to set aside the injunction; that relator has no adequate remedy other than the writ of prohibition to be issued by the supreme court; that the cause is not an appealable one, the amount involved being less than \$100; that, unless

writs of prohibition issue, relator would suffer great and irreparable injury, and all highly injurious to the interest of the community. Relator accordingly prayed that this court cause writs of prohibition to issue to the judge of the Twenty-First judicial district court for the parish of St. Charles, and to L. A. Cambre, forbidding the said judge to take cognizance of said cause, and forbidding the plaintiff Cambre from prosecuting his said writ of injunction, and declaring the same inoperative, and for all further necessary orders and general and equitable relief. Attached to relator's petition is a commission of the governor of the state, bearing date October 6, 1894, appointing B. J. Kuhlman police juror, ward 5, St. Charles parish, vice L. A. Cambre, removed, on which is indorsed the oath of office of said Kuhlman as police juror, under said appointment, taken on the 10th October, 1894; also a certified copy of the proceedings of the police jury of St. Charles at a meeting held on the 10th October, 1894. This meeting was composed of H. L. Youngs, T. C. Madere, A. E. Picard, P. M. Kenner, and B. J. Kuhlman. In the proceedings it is recited that the last three were police jurors recently appointed as such by the governor, vice three other police jurors, whom the governor had removed, viz. Picard, vice Le Sassier, removed; Kenner, vice Sarpy, removed; and Kuhlman, vice Cambre, removed. The two other persons were police jurors who, together with the three who had been removed, constituted the police jury prior to the removals. In the proceedings mentioned it is declared that these two police jurors recognized the three newly-appointed jurors as members of the jury. As so composed and organized, the police jury proceeded to business, and elected L. A. Keller as supervisor of election. Relator's petition considered, this court ordered the judge of the district court and L. A. Cambre to show cause why a writ of prohibition should not issue, and be made perpetual, and that in the meantime the said parties be restrained from interfering with Kuhlman, the relator, as a police juror for the parish of St. Charles. It further ordered that a writ of certiorari issue to the district judge, directing him to forward to this court a certified copy of the proceedings before him in this matter, to the end that their legality might be ascertained. A transcript was forwarded, as directed by our order. In transmitting the record, the district judge filed an answer or return, in which he states that on October 17, 1894, the petition in the case was filed; that the petitioner, alleging that he was in lawful possession of the office of police juror of the parish of St. Charles, and that defendant was about to forcibly take possession of said office, in which the interest of petitioner exceeded the sum of \$50, prayed for a writ of injunction restraining the defendant from taking possession of said office pending a judicial determination of his right and title thereto;

that, after examining the petition and affidavit annexed thereto, he granted the writ of injunction on petitioner's furnishing bond in the sum of \$200; that no proceedings were taken in the case until Tuesday, October 23, 1894, when the relator, through his counsel, by ex parte motions in open court moved for an order setting aside the writ of injunction for want of jurisdiction *ratione materiae*; that no plea to the jurisdiction of respondent's court had previously been filed or offered; that respondent refused to take immediate action on said motions, but requested that the same should be tried by a rule nisi, and contradictorily with the plaintiff; that relator insisted upon immediate action on said ex parte motions, which motions, for that reason, were overruled by respondent, and that thereupon the relator, through his counsel, notified respondent that application would at once be made to this court for writs of prohibition and certiorari; that the question of jurisdiction *vel non* has never been passed upon by him, or even been properly presented; that the proceedings held before respondent court were solely injunction proceedings, and that the writ issued in the case was granted on the sworn allegations of the plaintiff that he was in the lawful possession of the office of police juror of the parish of St. Charles. Respondent further avers that he has never usurped jurisdiction, and that he has never refused to revoke his said order or set aside the injunction; that he has not tried to control or interfere with the executive department of the state; that under article 11 of the constitution of the state any incumbent of a public office is entitled to appeal to the courts to be maintained in the possession of his office pending the judicial determination of the right and title to said office; that it is only in proceedings having such determination for their object that the right of removal of police jurors by the executive can be presented; that under article 201 of the constitution of the state provision is expressly made for the manner and form of removal from office; and finally, that the proceedings instituted in respondent's court being solely injunction proceedings, no such question was or could have been presented in said proceedings; that respondent has acted within the powers vested in district judges by the constitution and laws of the state, and that relator is not entitled to the relief asked for.

In the petition for injunction filed by Cambre he alleged: That he was appointed by Gov. Foster as a police juror of the Fifth ward of St. Charles parish. That said appointment was duly confirmed by the senate, and that he had duly taken his oath of office as such, as would more fully appear by the commission annexed thereto. That since his induction into office he had always performed, and still continued to perform, to the best of his knowledge and belief, all the duties incumbent on him. That by virtue of

his said appointment and confirmation his term of office did not expire before the next general election, to be held on the first Tuesday next following the third Monday in April, 1896. That he is entitled to all the fees, emoluments, and perquisites attached and belonging to said office up to said date, and which were as follows: For the regular meeting of November, 1894, \$3; for the regular meetings for January, March, May, July, September, and November, 1895, \$18; for the regular meetings for January and March, 1896, \$6; that in his said capacity as police juror he was ex officio syndic of the Fifth ward, and as such was entitled to a yearly salary of \$25; that in his said capacity as police juror he was ex officio member of the board of reviewers, and that as such he was entitled to at least one sitting, or \$3,—total, \$55. That at the last meeting of the police jury, held on the 11th day of September, 1894, it was moved that the police jury adjourn to the next regular meeting, on the first Monday in November, 1894, which motion was adopted. That since he has not received any notice from the secretary of the police jury, or any other officer, apprising him of any extra meeting of the police jury. That he has never been officially apprised of his removal from said office, and has not been guilty of any crime or cause that should warrant his removal, and therefore that petitioner is in actual and physical possession *de jure* and *de facto* of said office, and entitled to all emoluments thereto attached and belonging. That he is informed and verily believes that one B. J. Kuhlman illegally and wrongfully claims the aforesaid office of petitioner, and, in conjunction with others, did unlawfully meet and assemble in the parish of St. Charles on the 10th day of October, 1894, and did endeavor to transact business as members of the police jury of the parish of St. Charles. That, in order to properly protect the possession of petitioner in his aforesaid office against the interference of claimant aforesaid, it was necessary that an injunction should issue, ordering and commanding the said Kuhlman to desist and refrain from interfering with petitioner in the discharge of his duties as police juror of the Fifth ward of St. Charles parish, and particularly that he be restrained, enjoined, and prohibited from attending, sitting, or in any wise acting as police juror as aforesaid, at any time or place, and more particularly the next regular meeting of the police jury on the first Monday of November, 1894, and until the title to said office shall have been judicially determined. That, unless said injunction be granted, petitioner feared and believed that Kuhlman would endeavor to take the law in his own hands, and, with the assistance of others, practically to oust petitioner, the present incumbent, in advance of judicial determination, and that same would cause petitioner irreparable injury. Petitioner

prayed that the court issue an injunction, ordering and commanding L. A. Cambre to desist and refrain from interfering with petitioner in the discharge of his duties as police juror and ex officio syndic of the Fifth ward of St. Charles parish, and particularly that he be restrained, enjoined, and prohibited from attending, sitting, or in any wise acting as police juror as aforesaid, at any time or place, and more particularly on the next regular meeting of the police jury on the first Monday of November, 1894, and until the title to said office shall have been judicially determined; that the defendant be cited; and that the writ of injunction be made absolute and perpetual. The district judge ordered that a writ of injunction issue as prayed for, on petitioner's furnishing bond, with solvent security, and conditioned according to law, in the sum of \$200.

On petitioner's executing a bond for the amount fixed in favor of Kuhlman to secure to him the payment of all such damages as he might recover in case it should be decided that the injunction was wrongfully obtained, a writ of injunction issued as ordered. The interest which the public might have in the issues raised was ignored, and not attempted to be safeguarded on the bond. The commission referred to in the petition as being attached and made part of it showed that he was appointed as a police juror on the 3d of June, 1892, and qualified under the commission on the 5th July, 1892. The proceeding of Cambre in the matter of the injunction sued out which has been brought before us in this case, notwithstanding the use of the name of the state in its title, is a private suit of Cambre against Kuhlman. Its object, however, is not so much to stay the payment to Kuhlman of any moneys which, but for the injunction, would be made to him under color of office as a police juror, as through the arm of the judiciary to direct, control, and regulate the performance of public duties by officers of another department of the government. When such a result is sought to be brought about, pleadings of an exceedingly specific character, showing exceptionally strong facts in aid of the relief asked, must be presented to a court to justify its assuming jurisdiction. Mere conclusions of law or conclusions of ultimate facts will not suffice, nor should the pleader take anything by failing to bring affirmatively to the knowledge of the court, if known to him, the condition of affairs which he must be aware would eventually be advanced as those upon which the defendant was basing and grounding the claims and pretensions under which he was acting. It is his duty, in such a proceeding, to state, as far as possible, the whole case, to the end that the court may be completely advised in the premises. Nothing should be held back which, if known to the court, would probably influence it in determining the question of its own powers. Usually, vague and

general pleadings are not fatal to a demand. Imperfect statement of a cause of action is ordinarily remedied by amendment on exception taken, but in matters of the present character we are of, the opinion that the pleadings in the case affect the jurisdiction, and that a court should not act at all unless a cause of action is plainly set out, and is manifest on the face of the papers; and we are of the opinion that it is authorized of its own motion, and in spite of the allegations of the petition for the injunction, to take cognizance of matters of which it can legitimately take judicial notice, which enter as factors in determining the question of its own powers and duties. The court should be first assured of its own jurisdiction. If a district judge should inadvertently have assumed it under circumstances where he should not have done so, we have the power, and it is our duty, under our supervisory control over the lower courts, to set aside the orders given by him. It is of the utmost importance that the different departments of the state should not clash, but that each should pursue its legitimate functions free from interference from the other. That there may be cases of such a character as to force the judiciary, in the discharge of its own duty, to review, to declare null and void, and to set aside acts of the legislature or executive departments, is beyond question; but, as we have said, the occasion which would require it to do so at the instance of an individual citizen by way of injunction, which would at once ex parte restrain and change (temporarily, at least) the course which public affairs would naturally have followed but for the injunction, must be clear and patent. Private interests should yield to those of the public. In the case at bar it is clear that Cambre, after having been appointed, commissioned, and qualified as a police juror for the parish of St. Charles by the governor, was subsequently removed by him, and the relator, Kuhlman, appointed in his place; that simultaneously two other police jurors were removed by the governor, and others appointed in their places; that the three new appointees qualified under their commissions, and, presenting themselves, with their commissions and oaths of office, to the remaining police jurors, they were recognized by the latter as police jurors, and a meeting of the police jury was organized, in which the new appointees participated, selecting or electing a supervisor of election at such meeting, and that the injunction which was issued was applied for and granted subsequent to this meeting. In his petition for injunction, Cambre alleges that "one B. J. Kuhlman illegally and wrongfully claims the office of police juror" (to which he had himself been appointed), but he does not inform the court, as he should have done, that Kuhlman claimed the office under a commission from the governor of a date subsequent to that of his own commis-

sion, and that the subsequent commission was issued by reason of his own removal from office by the chief executive; and, while he alleges that Kuhlman, in conjunction with others, did unlawfully meet and assemble in the parish of St. Charles on the 10th of October, 1894, and did endeavor to transact business as members of the police jury of St. Charles, he does not inform the court that the persons with whom he acted in conjunction were two of the police jurors of the parish of St. Charles, holding by undisputed title, and two other persons who, having been appointed by the governor as police jurors, had qualified under the commissions issued to them, and who were recognized, as was Kuhlman, by the older members as police jurors of the parish. He avers that "those parties did unlawfully meet and assemble as police jurors," but he does not state how or why the meeting was unlawful. The ground for that attack is, we infer, to be found in the allegation that the police jury, when it had adjourned before, had adjourned to its next regular meeting, and that he had not been notified of a called meeting, nor notified of his having been removed from office as a police juror. No other reason seems to have been assigned. There is no charge made in the petition that the governor was without power or authority to remove a police juror. If any such claim was intended to be advanced, it was merely inferentially and consequentially advanced under the allegation that, by virtue of his appointment and confirmation, his term of office did not expire before the next general election, to be held on the first Tuesday next following the third Monday in April, 1896, and we do not think this indirect general allegation fairly raised an issue as to the governor's legal or constitutional power of removing a police juror from his office. The issue that he tendered was rather that the governor had acted improperly, and without cause, than that he had acted without authority,—an issue which (granting the power to remove) was one which should not have been raised, and could not be passed upon by the court. We take judicial notice of Act No. 125, Ex. Sess. 1877. That act has not been repealed. Whether or not it has become inoperative by reason of the adoption of the constitution is not a question to be lightly raised, and on general indirect allegations, nor to be raised by the court itself. This statute has been constantly acted upon by the executive of the state since 1880. The official action of the head of the executive department is presumed to be within the scope of his authority. This presumption is sufficiently strong, under the statute cited, to entitle a person, who has qualified as a statute officer, in an

office, the appointment to which is vested in the governor, prima facie to possession of the office. If he is to be kept out of possession at all, it must be, as we have said, under exceptional circumstances, specially set forth, and under a direct issue as to the power of the governor. It is shown in this case that not only had Kuhlman been appointed and qualified as police juror, but he had been recognized as such by the other members of the jury, and that together they had organized and held a meeting of that body. Kuhlman had actually gone into possession of the office, and the allegation that Cambre feared he would seek to take forcible possession of the same is therefore without foundation. No action seems to have been taken by the jury after its adjournment until the meeting in which Kuhlman participated; therefore no act of possession of the office by Cambre is shown after his removal by the governor. If the governor had the power to remove him, there was no necessity for official notification to him of the removal to bring it about. The removal of itself operated a divestiture of the office, at least for the purposes of this suit. Had intermediate action taken place before notice, in which Cambre had participated, in ignorance of his removal, and were the validity of action taken at that time, and, under these circumstances, contested, a different question would arise. If Cambre was removed from office, he was not entitled to notice of a called meeting of the jury. The legality of the police jury as a body as it met at the meeting in which Kuhlman participated, and the legality of the meeting, cannot be collaterally raised or disposed of in the injunction suit. We are of the opinion that the district judge, in taking jurisdiction in the matter of the petition praying for an injunction, and in issuing the injunction he did, erred, and that, when the want of jurisdiction was called to his attention and urged, he should have at once discharged the injunction. He could have done so of his own motion. There was no necessity for action to be taken contradictorily with Cambre. In deciding this case we take occasion to refer to the views expressed by the supreme court of Alabama in *Beebe v. Robinson*, 52 Ala. 66, and to the case of *Cameron v. Parker* (Okla.) 38 Pac. 14 et seq. For the reasons herein assigned, it is hereby ordered, adjudged, and decreed that the writ of prohibition which issued in this matter be perpetuated, and that the injunction granted by the district judge of the Twenty-First judicial district court of the state of Louisiana for the parish of St. Charles in the matter of L. A. Cambre vs. B. J. Kuhlman (No. 80 of the docket of that court) be, and the same is hereby, set aside and discharged.

STATE ex rel. RENNER v. CURRY.

(33 N. E. 685, 134 Ind. 133.)

Supreme Court of Indiana. March 8, 1893.

Appeal from circuit court, Morgan county; Eli F. Ritter, Special Judge.

Petition for mandamus, brought by the state on the relation of Charles G. Renner against Robert Curry. The writ was refused, and the relator appeals. Affirmed.

W. R. Harrison and C. G. Renner, for appellant. Jordan & Matthews, for appellee.

OLDS, J. This is a proceeding in mandamus to compel the appellee, as mayor of the city of Martinsville, to issue an order to the appellant's relator for the sum of \$18, allowed by the common council of said city for services rendered by the relator as city attorney. The complaint alleges that the relator is the duly-elected city attorney for said city, and qualified and acting as such, and that the common council allowed him the above-named sum for his services, and the appellee, the mayor of said city, refused on demand to issue the order therefor, and asked that he be compelled to issue the order. The appellee answered in three paragraphs. The first paragraph is a general denial. A reply was filed to the other two. There was a trial, resulting in a finding and judgment for the defendant. Appellant filed a motion for new trial, which was overruled, and exceptions reserved. Errors are assigned on the rulings of the court in overruling demurrers to the second and third paragraphs of answer, overruling the motion for new trial, and that the said second and third paragraphs of answer do not state facts sufficient to constitute a defense.

The record does not show the presenting and overruling of demurrers to the second and third paragraphs of answer. This fact is conceded by counsel for appellant, but it is sought to question the sufficiency of the answer for the first time in this court by an assignment of errors that said paragraphs of answer do not state facts sufficient to constitute a defense to relator's petition. That the sufficiency of an answer cannot be first questioned in this court is now well settled. *Railroad Co. v. Modesitt*, 124 Ind. 212, 24 N. E. 986. See, also, *Elliott*, App. Proc. §§ 476-181, where the question is fully discussed, and authorities collected.

This leaves for our consideration only the question presented by the motion for new trial. After this suit was commenced, at a meeting of the common council of the city, they passed a resolution reciting the following facts: That the relator claimed to be the city attorney, and that he also claimed that James H. Jordan, who was elected city attorney of said city June 1, 1888, was removed; that the circuit court of said Morgan county had held that said Jordan was not removed; that it created confusion; that it be and was declared that said Jordan was the only legal attorney for said

city, which resolution was offered by the appellee, and admitted in evidence over the objections and exceptions of the appellant. And it is further contended that the finding is not supported by the evidence, and is contrary to law. Conceding, without deciding, that it was error to admit in evidence the resolution adopted by the common council after the commencement of this suit, we will consider the question as to whether or not it was harmful, and such an error as entitles the appellant to a reversal of the judgment. The statute (section 3043, Rev. St. 1881; section 3476, Rev. St. 1894) creates the office of city attorney if the common council deem it expedient, and provides for his appointment by the common council. Section 3078, Rev. St. 1881 (section 3513, Rev. St. 1894), prescribes his duty, and section 3095, Rev. St. 1881 (section 3530, Rev. St. 1894), provides for his taking an oath and giving a bond. The city attorney is appointed in the same manner as the street commissioner and the civil engineer, and he becomes an officer of the city on his being appointed and qualifying by taking the oath and giving bond as prescribed by the statute. The statute contemplates and makes provision for only one city attorney, and provides that he, like the street commissioner and civil engineer, shall hold his office for two years, subject to removal by the common council at their pleasure. Section 3043 (section 3476), supra. It is evident that after a city attorney has been elected, and he has qualified, that he holds his office for two years, unless he be removed, and until he is removed or dies or resigns there is no vacancy which can be filled by the common council. In other words, while a regularly appointed and qualified city attorney continues in office, the common council have no power whatever to appoint another, for no such power is given to them by the statute. The council may remove at their pleasure, and if they exercise this power legally the office becomes vacant, and they may then appoint an officer to fill the office; but until they do exercise the power to remove, and in fact remove, the legal officer, he occupies the office, and there is no power in the city council to appoint another. It is conceded on the part of the appellant,—and, if it were not conceded, the record so shows,—and the case was prosecuted and proceeded upon the theory, that James H. Jordan was duly appointed city attorney on the 1st day of June, 1888, and that he duly qualified and acted as such; but it is contended that on July 19, 1889, the common council removed him, and appointed the relator city attorney, and the evidence shows that from that time forward there was a dispute as to who was the city attorney; Jordan continuing to act and claiming to be city attorney, and the relator acting when called upon. It appears from the vote on the resolution heretofore referred to that the council was composed of 10 members, 5 favoring the relator and 5 favoring Jordan, and that the mayor favored Jordan, so that when one of

either faction was absent from a meeting the other had a majority to pass resolutions or allow claims for services. In *Byer v. Town of New Castle*, 124 Ind. 86, 24 N. E. 578, it is held that "the only competent evidence of any act or proceeding of a municipal body upon which the members of the corporate body are required to vote is the record of the proceedings." It would seem that this doctrine would apply in full force in such a case as the one at bar, where the action of the common council involved the election or removal of an officer. By section 3068, Rev. St. 1881 (section 3503, Rev. St. 1894), it is made the duty of the city clerk to attend all meetings and make record of all proceedings of the common council. The statute clearly contemplates the making of a record. The public have an interest in knowing who are the legally elected or appointed officers of the city. At the meeting of July 19, 1889, there was a record made, and it was put in evidence in this case, and is the only record or evidence of any character relating to the question of removal of Jordan or the appointment of the relator as city attorney. The record of this meeting shows seven members of the common council present, naming them, and thus the record is as follows: "Journal of last meeting read and approved. The following resolution was introduced and read, to wit: Be it resolved by the common council of the city of Martinsville, Ind., that J. H. Jordan be discharged from further services as city attorney, and that said office be, and the same is hereby, declared vacant. A motion was made by Councilman Miller that the vote upon the above resolution be by ballot; those in favor of declaring the office of city attorney vacant voting 'Yes,' those opposed voting 'No.' The roll was called, resulting as follows: Yeas: Duncan, Mabee, Miller, and Schnaefer.—4. Nays: McCracken, Maxwell, and Prewitt,—3. Motion carried." Then the record shows that the council proceeded to ballot for a city attorney, several ballots being taken without a choice. Finally the relator received 4 of the 7 votes. The record

stating the last ballot and adjournment is as follows: "On 4 ballots W. S. Shirley received 1 vote, C. G. Renner received 4 votes, and Jas. H. Jordan 2 votes. By agreement of the council the matter was postponed until the next regular meeting. Council adjourned." Afterwards the relator filed his bond, which was approved by the signatures of four members of the council, and he took the oath. The record of the meeting held July 19, 1889, does not show that any vote was ever taken on the resolution to remove Jordan and declare a vacancy. The resolution was introduced, and at that point in the proceedings Councilman Miller made a motion that the vote upon the resolution be by ballot, and a vote was taken upon the motion of Miller, and it carried, and then all action relating to resolution or removal ceased. No vote was ever taken by ballot or otherwise on the resolution, nor was any other action taken in relation to the removal of Jordan; hence Jordan was not removed, and no vacancy was created or declared in the office of city attorney, and all action taken towards electing another or approving his bond or recognizing him as the city attorney by some member of the council or other persons was a nullity, and amounted to nothing. Furthermore, the record does not show an election of the relator. It affirmatively appears that immediately after the fourth ballot was taken the matter of election was by agreement postponed, and no election was ever declared, but, on the contrary, was by agreement postponed, and never taken up afterwards. The action is to compel the issuing to him of an order as city attorney, and in payment of his salary or compensation for his services as such. The record is conclusive against the appellant, and in no phase of the case was he entitled to recover, and the introduction of the record showing the adoption of the resolution after the commencement of this suit, though erroneous, was harmless. The finding and judgment of the court was proper under the facts in the case, and there is no error in the record. Judgment affirmed.

STATE ex rel. KEITH et al. v. COMMON
COUNCIL OF MICHIGAN
CITY et al.

(37 N. E. 1041, 138 Ind. 455.)

Supreme Court of Indiana. June 21. 1894.

Appeal from circuit court, La Porte county;
Daniel Noyes, Judge.

Application for mandamus by the state of
Indiana, on the relation of George Keith and
another. From a judgment sustaining a de-
murrer to the petition, plaintiffs appeal. Af-
firmed.

W. B. Biddle, for appellants. Jas. F. Gal-
laher, for appellees.

DAILEY, J.¹ * * * * *

There is another view of the question. A
large part of the argument of the learned
counsel for the appellants consists of an ef-
fort to eliminate the ordinance from the con-
tract, and to show that the latter must stand
alone, unaffected by the ordinance. But it
appears the contract has more need of the
ordinance than the ordinance has of the con-
tract. The ordinance is the act of the com-
mon council. The contract is an agreement,
executed by the mayor of the city, acting un-
der its instructions. The council has authori-
ty to order street improvements, but the
mayor is vested with no such authority. The
petition recites: "On the 11th day of July,
1887, the said council authorized the mayor
to enter into a contract with the relator
George Keith to construct said pavement;
and in pursuance of said authority, on the
12th day of July, 1887, William F. Woodson,
who was then the mayor of said city, on its
behalf entered into the following contract."
The return of the city states "that the said
contract was awarded to said relator George
Keith, and the council of said city instructed
William F. Woodson, the mayor of said city,
to enter into contract with said relator Keith,
and that on the 12th day of July, 1887, said
Woodson, as mayor of said city, did enter
into a contract with said relator Keith for the
furnishing all materials and the constructing
said improvement, as provided for in said or-
dinance, plans, and specifications." The con-
tract itself says: "In witness whereof, the
said parties of the first part have executed
this agreement by the mayor of said city of
Michigan City, the day and year first above
written, according to a resolution adopted
by the common council of said city July 11th,
1887, instructing him to enter into such con-
tract with said parties of the second part."
The contract is signed by William F. Wood-
son, mayor of Michigan City. There is noth-
ing in the record alleging that this contract
was ever approved by the common council;
so that, as it stands here, it derives its sole
claim to be an agreement of binding force
upon the city from the authority previously

conferred upon the mayor to execute it. The
mayor of a city cannot give a contractor a
lien upon the property of its citizens. Con-
tracts made by him have no more binding
force against the city than have those of a
councilman. In the signing of this contract,
the mayor was acting simply as the instru-
ment or agent of the council, which alone
has power to obligate the city. If, then, in-
deed he exceeded or varied from the au-
thority which had been conferred upon him
for a special purpose, his action to that ex-
tent was void as to the city, and the con-
tract became the contract of the city only so
far as it complies with the instructions given
to the mayor by the council when he was
authorized to execute it. The language last
quoted from the return leaves no room for
doubt as to what those instructions were
which were given to the mayor by the coun-
cil, and which were his only warrant for
contracting at all. He was instructed to
enter into the contract, which had already
been awarded to the appellants by the ac-
ceptance of their bid, made in response to the
publication of the city. "The said contract
was awarded to the said relator Keith, and
the common council instructed William F.
Woodson, mayor of said city, to enter into
contract with said relator Keith." All of
this action was taken under the ordinance,
and it certainly could not be claimed with
reason that the mayor was authorized by
these instructions to enter into any contract
differing from the ordinance by which the
work was ordered. The appellants say in
their petition: "The mayor entered into the
contract in pursuance of this authority." Could he, in pursuance of this authority, have
bound the city by a contract providing for a
pavement of brick, instead of cedar block,
as ordered by the ordinance? Could he have
contracted for a pavement 60 feet in width,
instead of 54½ feet in width, as specified in
the ordinance? And, if he had so contract-
ed, would the court order the assessment of
the extra cost against the abutting property?
Certainly not, for the reason that his authori-
ty was limited to the agreements required by
this ordinance, and for the further reason
that the foundation for no other contract
had been laid by the common council. The
ordinance is the pillar which supports the
contract. According to the record before us,
it is the only action taken by the common
council as a body authorizing this improve-
ment or justifying an assessment, and no ac-
tion taken by any person or any other body
can alter its specifications or amend its con-
ditions.

The position here taken is only a part of
the law of agency, but it has been frequently
applied to municipal law by the text-books
on that subject. In Dillon on Municipal Cor-
porations (4th Ed. § 447) the author says:
"And it is a general and fundamental prin-
ciple of law that all persons contracting with
a municipal corporation must, at their peril,

¹ Part of the opinion is omitted.

inquire into the power of the corporation or of its officers to make the contract. * * * This principle is more strictly applied, and properly so, than in the law of private corporations. So, also, those dealing with the agent of a municipal corporation are likewise bound to ascertain the nature and extent of his authority. This is certainly so in all cases where the authority is special and of record, or conferred by statute." Also, from section 452 of the same work: "Where officers or agents of a corporation, duly appointed and acting within the scope of their authority, sign an instrument," the instrument is to be regarded as the simple contract of the corporation. Note 2 under this section: "The general rule is unquestionable that a municipal corporation is not bound by the unauthorized acts of an individual, whether an officer of the corporation or a mere private person." *Davies v. Mayor, etc.*, 93 N. Y. 250. "Where a committee was empowered to contract for the erection of a building at a price not to exceed a specified sum, it was held that they had no power to contract for a larger sum, and that the person contracting with them was bound to take notice of the extent of their powers." *Turney v. Town of Bridgeport*, 55 Conn. 412, 12 Atl. 520. In section 935 of the second volume of

Dillon on Municipal Corporations, the rule is thus stated: "Nor, as we have before stated, is a municipal corporation bound by contract, within the scope of its chartered powers, if made by officers or agents not thereunto authorized." The cases cited by counsel for the appellants in this branch of his argument are not at all opposed to the doctrine stated. In *Clements v. Lee*, 114 Ind. 397, 16 N. E. 799, it is held that a person about to enter into a contract with a city must inform himself as to the jurisdiction of the council to contract. *Taber v. Ferguson*, 109 Ind. 227, 9 N. E. 723, decides that, as the statute does not require the proof of notice by publication to be filed with the clerk, the transcript will not be held bad on demurrer for want of the notice. In *City of Indianapolis v. Imberry*, 17 Ind. 175, the court holds that it is not necessary for the council to place of record its determination as to whether or not the general fund shall bear a portion of the cost of the improvement. We think these decisions are of no avail in determining what contract was made by the city, and what are its corporate obligations under the facts set forth in the return.²

* * * * *

² Part of the opinion is omitted.

TAYLOR v. CITY OF OWENSBORO.

(32 S. W. 948, 98 Ky. 271.)

Court of Appeals of Kentucky. Nov. 16, 1895.

Appeal from circuit court, Daviess county.
 "To be officially reported."

Action by Ashby Taylor against the city of Owensboro to recover damages for an alleged wrongful arrest. Defendant had judgment, and plaintiff appeals. Affirmed.

John Feland & Son, for appellant. J. D. Atchison, for appellee.

PAYNTER, J. The appellant instituted action against the city of Owensboro, seeking to recover damages for an alleged wrongful arrest, conviction, and confinement in the workhouse of the city. It is alleged in the petition, in substance, that C. N. Pendleton is the judge of the police court of the city of Owensboro; that, as such officer, he issued a warrant against appellant, charging him with violating an ordinance of the city of Owensboro denouncing a penalty for a breach of the peace; that, by virtue of the warrant, the city marshal arrested him, and carried him before the police court, where he was tried, convicted of a breach of the peace, and adjudged that the city of Owensboro recover of him \$100 and costs, and, failing to pay which, he was confined in the workhouse of the city for some time. It is also alleged that the proceedings were under an ordinance which reads as follows, to wit: "Any person or persons who shall within the city of Owensboro be guilty of a riot, rout, unlawful assembly or breach of the peace shall upon conviction be fined not less than ten nor more than one hundred dollars." It is insisted that the ordinance under which the prosecution took place is unconstitutional and void, and therefore appellant is entitled to recover damages of the city. A demurrer was sustained to the petition, and, appellant failing to amend, his petition was dismissed. Section 1268, St. Ky., is as follows: "If any person or persons shall be guilty of a breach of the peace * * * the person so offending and each of them shall be fined not less than one cent nor more than one hundred dollars or imprisonment not less than five nor more than fifty days or both so fined and imprisoned." By the terms of the ordinance the fine for a breach of the peace cannot be less than \$10, nor more than \$100, and imprisonment is not part of the penalty, while, under the statute, for a breach of the peace, the minimum fine is 1 cent, and the maximum fine \$100, and, in addition to which, imprisonment for not less than 5, nor more than 50, days may be inflicted. It will therefore be observed that the penalty for a breach of the peace under the ordinance is much less than the one denounced in the statute. Section 168 of the constitution is as follows:

"No municipal ordinance shall fix a penalty for a violation thereof at less than that imposed by statute for the same offense. A conviction or acquittal under either shall constitute a bar to another prosecution for the same offense." The penalty for a breach of the peace under the ordinance being less than the one imposed by statute, the ordinance is in violation of the constitution, and void. Under subsections 22, 23, § 3290, St. Ky., the common council of cities of the third class have the power, within the limits of the constitution of this state and the act relating to cities of that class, to pass ordinances imposing fines and imprisonment for the violation of ordinances and by-laws, breaches of the peace, etc. The ordinance imposing a fine for a breach of the peace being void, the statute remained as if no action whatever had been taken by the common council. There was a statute in force under which both fine and imprisonment could be imposed for a breach of the peace in the city of Owensboro. The judge of the police court of that city had jurisdiction to try persons charged with that offense. A warrant was issued, charging the appellant with the offense of a breach of the peace, under which he was arrested, tried, and convicted. It is alleged in the petition he was required to answer "the charge of violating city ordinance 3, breach of the peace in said city." We understand this to mean that appellant was charged with the offense of a breach of the peace. Although he was charged with violating the ordinance, yet the gravamen was a breach of the peace. The judge and the marshal may have proceeded to, and did, prosecute the appellant under charge of a breach of the peace, believing the ordinance in question to be in force, and imposed the fine, yet it was not in force, but a statute was, which authorized the imposition of the fine for a breach of the peace. The jurisdiction of the court existed, with ample power to try and convict the accused on the charge of a breach of the peace, if proven guilty; and, although the judge may have labored under the erroneous impression that the ordinance was in force, yet, having imposed such fine as he had authority to do by statute, his judgment was not void, and appellant's imprisonment under it illegal. A judgment may be right, still the court may have given a very insufficient or erroneous reason for it. The warrant may have coupled with the charge of a breach of the peace the fact that it was in violation of a void ordinance; still the warrant would be valid, because, by statute, a penalty is denounced for the breach of the peace. While the warrant may not have been in exact form as the charge and the law, still the court had jurisdiction of the matter.

The appellant could have raised any objection he saw proper to the warrant. He was in court, pleaded not guilty, and proceeded in the trial, so far as the petition

shows, without raising any question as to the form of the warrant, or manner of stating the charge against him; and, as the court had jurisdiction to try the case, the only remedy which appellant had was by appeal from the judgment of conviction. Had there been no statute imposing a fine, etc., for a breach of the peace, then the question as to the effect of such judgment would be a different question from the one presented in this case. However, that would not affect the question as to the liability of the city. Municipal governments are auxiliaries of the state government. They are created principally to aid in securing a proper government of the people, within the boundaries of such municipality, and to make more effectual the maintenance of the public order. The judges of the police courts, as well as the marshal of municipalities, are officers of the commonwealth and their respective municipalities, although their duties might be confined to the enforcement of the law within a specified territory. The marshals of such cities are declared to be peace officers of the cities and commonwealth. St. Ky. § 3341. A breach of the peace is a public offense. It is an offense against the commonwealth. The general assembly has so declared it to be. While the general assembly has conferred authority upon the common councils of cities of the third class to impose a penalty on those who may be guilty of it within certain limits, still the offense remains a public one, and against the commonwealth. The evident purpose of the constitutional convention and the general assembly was to make more certain and effective the prosecution of the persons who might be guilty of such offenses, by conferring upon those immediately affected by such violation of the law the authority to enforce the law, and inflict punishments for its violation; but, that proper penalties should be imposed under municipal ordinances, the constitution prohibits prescribing by an ordinance a less penalty than that fixed by statute for the offense. That one charged with such offenses as were denounced by statute and by a municipal ordinance should be put in jeopardy but once, the constitution declared a conviction or acquittal under one should constitute a bar to another prosecution for the same offense. A municipal corporation is not liable for the acts of its officers in enforcing the criminal or penal laws of the commonwealth, or in enforcing penal ordinances of the city. The maxim respondeat superior has no application. It is said in Dill. Mun. Corp. §§ 974, 975: "It may be observed, in the next place, that when it is sought to render a municipal corporation liable for the act of servants or agents, a cardinal inquiry is whether they are the servants or agents of the corporation. If the corporation appoints or elects them, can control them in the discharge of their du-

ties, can continue or remove them, can hold them responsible for the manner in which they discharge their trust, and if those duties relate to the exercise of corporate powers, and are for the peculiar benefit of the corporation, in its local or special interest, they may be justly regarded as its agents or servants, and the maxim of respondeat superior applies. But if, on the other hand, they are elected or appointed by the corporation, in obedience to the statute, to perform a public service, not peculiarly local or corporate, but because this mode of selection has been deemed expedient by the legislature in the distribution of the powers of the government, if they are independent of the corporation as to the terms of their office, and the manner of discharging their duties, they are not to be regarded as the servants or agents of the corporation, for whose acts or negligence it is impliedly liable, but as public or state officers, with such powers and duties as the statute confers upon them, and the doctrine of respondeat superior is not applicable. It will thus be seen, on general principles, it is necessary, in order to make a municipal corporation impliedly liable, on the maxim of respondeat superior, for the wrongful act or neglect of an officer, that it be shown that the officer was its officer, either generally, or as respects the particular wrong complained of, and not an independent public officer; and, also, that the wrong was done by such officer while in the legitimate exercise of some duty of a corporate nature, which was devolved on him by law, or by the direction or authority of the corporation. Agreeably to the principles just mentioned, police officers appointed by a city are not its agents or servants, so as to render it responsible for their unlawful or negligent acts in the discharge of their duties; and, accordingly, a city is not liable for an assault or battery committed by its police officers, though done in an attempt to enforce an ordinance of the city, or for an arrest made by them which is illegal, for want of a warrant, or for other causes, or for their unlawful acts of violence, whereby, in the exercise of their duty of suppressing an unlawful assemblage of slaves, the plaintiff's slave was killed. So, on the same principle, a person who suffers a personal injury while aiding the police officers of a city, at their request, in arresting disturbers of the public peace under a valid ordinance, has no remedy against the city. The municipal corporation, in all these and the like cases, represents the state or the public, the police officers are not the servants of the corporation, the principle of respondeat superior does not apply, and the corporation is not liable, unless by virtue of a statute expressly creating the liability." The principle enumerated by Mr. Dillon is sustained by almost an unbroken line of decisions of the courts of this country, and by this court in the cases

of Pollock's Adm'r v. Louisville, 13 Bush, 221; Jolly's Adm'r v. City of Hawesville, 89 Ky. 279, 12 S. W. 313; Prather v. Lexington, 13 B. Mon. 559. The cases rest on the ground that municipalities represent the

commonwealth, and municipal officers, while engaged in duties relating to the public safety, and in the maintenance of public order, are the servants of the commonwealth. The judgment is affirmed.

HORTON v. NEWELL, City Treasurer.

(23 Atl. 910, 17 R. I. 571.)

Supreme Court of Rhode Island. Jan. 2, 1892.

Exceptions to court of common pleas.

This was an action of trespass on the case, brought by Daniel H. Horton against George W. Newell, city treasurer of the city of Pawtucket, to recover damages for an alleged malicious suit brought by the tax collector of the city against the plaintiff. From a judgment sustaining a demurrer to the declaration plaintiff excepts. Affirmed.

Jacob W. Mathewson, for plaintiff. Thomas P. Barnefield, City Sol., for defendant.

PER CURIAM. A municipal corporation is not liable for the acts of its officers, unless previously authorized or subsequently ratified by it, or unless done in good faith in pursuance of a general authority to act

for the city in the matter to which they relate. *Donnelly v. Tripp*, 12 R. I. 97, 98. The declaration does not allege that the city of Pawtucket authorized the suit by Newell in his capacity as tax collector, complained of as malicious, or that it has even ratified the bringing of the suit. If it was maliciously brought by Newell, it was not brought in good faith, which is essential to render the city liable as for an act done in pursuance of a general authority to act for it, under the rule stated above. The demurrer was therefore properly sustained. We presume that Newell, in bringing the suit, acted not under authority from the city of Pawtucket, but in pursuance of the statutory authority conferred on him as tax collector by Pub. St. R. I. c. 44, § 26. If so, it is difficult to see how the city of Pawtucket is liable. Exceptions overruled, and judgment of the court of common pleas affirmed, with costs.

RYCE v. CITY OF OSAGE.

(55 N. W. 532, SS Iowa, 538.)

Supreme Court of Iowa. May 25, 1893.

Appeal from district court, Mitchell county; G. W. Ruddick, Judge.

Action against the defendant for compensation for services as an attorney. Judgment for defendant. Plaintiff appeals.

L. M. Ryce, pro se. N. L. Rood, for appellee.

KINNE, J. 1. Plaintiff's cause of action is set out in three counts, and may be summarized as follows: In 1889, plaintiff was elected as city attorney for defendant for the term of two years, and afterwards entered upon his duties. At the time of his election, as well as when he performed the services sued for in this action, there was an ordinance in force in said city, section 5 of which provided as follows: "The duties of the city solicitor shall be to give his legal opinion and advice upon any subject or question that may be submitted to him for that purpose by the city council or mayor, to act as attorney for the city in any suit or action brought by or against the city, and generally to attend to the interests of the city, as its attorney; and his compensation therefor shall be the sum of \$100 per year." When he entered upon his office, a suit was pending against the city, which had been brought by one Smith, to quiet the title to a tract of land therein known as a "public square." One Coffin was, prior to plaintiff's taking the office of city attorney, conducting said suit under special contract with the city. When plaintiff entered upon the duties of his office, he claims it was the understanding and agreement between him and the council of the defendant that he should take charge of and defend said suit in the district and supreme courts, and the city would pay him therefor in addition to his salary as city attorney. He did so, and presented his bill to the council, and it was not allowed. That the city paid him \$200, being, as they claimed, his salary for the two years as city attorney. That the services he rendered in the defense of said suit were not included within his official duties as city attorney, and that, as said officer, he was in no event bound to defend said suit in the supreme court. That the city council, in 1886, by a resolution repealed said ordinance by fixing the salary of the city attorney at \$25, and such further compensation as they might deem just and equitable. That the defendant, having treated said ordinance as repealed, is now estopped from claiming it to be in force. That defendant city demurred to the petition on the ground that the labor claimed to have been performed by the plaintiff was a part of the duties which pertained to his office, and, his salary as city attorney being fixed by an ordinance, neither the council nor any of

its members had the power to make the alleged contract, and to bind the city thereby. That the facts set up, and claimed to amount to a repeal of said ordinance, were ineffectual to accomplish that end. The demurrer was sustained, and, plaintiff electing to stand upon his petition, and refusing to plead further, judgment was entered against him for costs, and his action dismissed.

2. The appeal presents the single question of the correctness of the ruling of the trial court in sustaining the demurrer. It is urged that the services rendered were not, even by the terms of the ordinance, included within the plaintiff's duty as city attorney. It seems to us that a mere reading of that section of the ordinance which prescribes the duties of the city attorney is sufficient to show that under it he was required to act for the city, as its attorney, in any case brought by or against it; and, if that is not broad enough, the further requirement certainly would be that he is "generally to attend to the interests of the city, as its attorney." That the services rendered by the plaintiff, and for which he now seeks to recover, were included within his duties as city attorney, is too plain to admit of argument.

3. It is claimed that this provision of the ordinance was repealed, or rendered inoperative, because the council, several years after its enactment, by a resolution fixed, or rather undertook to fix, the compensation of the city attorney at \$25 per year, and hence it is said that the city is now estopped from relying upon the ordinance. The statute provides the manner in which ordinances shall be passed. When legally passed, if not in conflict with constitutional or statutory provisions, an ordinance will remain in force until repealed or amended in a legal manner. We need not stop to argue the self-evident proposition that an ordinance cannot be repealed, or rendered ineffective or inoperative, by a failure to enforce it. Nor can an ordinance be repealed or superseded by the passage of a resolution which undertakes to fix another and different compensation for a city officer than that prescribed in the ordinance.

4. Furthermore, the passage of the resolution, even if it should be conceded to work a repeal of the ordinance, would not avail plaintiff. Our statute provides, as to officers of cities and incorporated towns, that "the emoluments of no officer whose election or appointment is required by this chapter shall be increased or diminished during the term for which he shall have been elected or appointed." Code, § 491. This statute has been construed to prohibit the city council from, on its own motion, changing the compensation of a city officer, or from accomplishing the same end by making a contract with the officer for compensation other than that fixed by the ordinance. Purdy v. City of Independence, 75 Iowa, 359, 39 N. W. Rep. 641. See City of Council Bluffs v. Waterman, (Iowa,) 53 N. W. Rep. 289, and

cases there cited. The council could not, even by repealing the ordinance and passing a new one, affect the compensation to be paid to plaintiff as city attorney during the term for which he was elected.

5. It is said that the city, having had the benefit of plaintiff's services, which were rendered under a verbal contract made with its council to pay therefor a sum in excess of his salary as city attorney, is now estopped from pleading or relying upon the ordinance which fixed his compensation. In support of this claim a large number of cases are cited. They are either cases which concerned private corporations, and parties contracting with them in good faith, where the corporation has had the full benefit arising from the performance of the contract, and sought to avoid it, or cases where municipal corporations have contracted with strangers for gas, grading, or other proper public improvements, and received all the benefit flowing therefrom. Surely, such cases are not authority for holding that a city, after fixing the salary of its officer in a legal manner, may enter into an arrangement with him whereby he may obtain additional compensation for services embraced within the duties of his office. Such a contract is against public policy, and void. *Vandercook v. Williams*, 106 Ind. 345, 1 N. E. Rep. 619, and 8 N. E. Rep. 113.

6. When plaintiff made the verbal contract with the defendant, under which he seeks to recover in this action, he knew, or was bound to know, that the services he would be called upon to render thereunder were included in his duties as city attorney, and that the salary of said office was fixed by ordinance at \$100 per year. No rule is better established than that "a person accepting a public office, with a fixed salary, is bound to perform the duties of the office for the salary." 1 Dill. Mun. Corp. § 233, and note; *Fawcett v. Woodbury Co.*, 53 Iowa, 154, 7 N. W. Rep. 483; *Purdy v. City of Independence*, 75 Iowa, 358, 39 N. W. Rep. 641; *City of Council Bluffs v. Waterman*, (Iowa,) 53 N. W. Rep. 289; *Bayha v. Web-*

ster Co., 18 Neb. 131, 24 N. W. Rep. 457; *State v. Silver*, 9 Neb. 88, 2 N. W. Rep. 215; *Evans v. City of Trenton*, 24 N. J. Law, 764; *Com. v. Holmes*, 25 Grat. 771; *Turpen v. Board*, 7 Ind. 172; *Territory v. Carson*, 7 Mont. 417, 16 Pac. Rep. 572; *Hays v. City of Oil City*, (Pa. Sup.) 11 Atl. Rep. 63; 19 Amer. & Eng. Enc. Law, p. 529. And a promise to pay a city attorney "an extra fee or sum beyond that fixed by law is not binding, although he renders services, and exercises a degree of diligence greater than could legally have been required of him." 1 Dill. Mun. Corp. § 234; *Carroll v. City of St. Louis*, 12 Mo. 444; *City of Detroit v. Whittemore*, 27 Mich. 281; 19 Amer. & Eng. Enc. Law, pp. 529, 530; *Hays v. City of Oil City*, (Pa. Sup.) 11 Atl. Rep. 63; *Territory v. Carson*, 7 Mont. 417, 16 Pac. Rep. 572. And it has often been held that a payment to a public officer of a sum in excess of that fixed by law for his compensation is unauthorized and void. *Adams Co. v. Hunter*, 78 Iowa, 328, 43 N. W. Rep. 208; *Fawcett v. Woodbury Co.*, 53 Iowa, 154, 7 N. W. Rep. 483; *Fawcett v. Eberly*, 58 Iowa, 544, 12 N. W. Rep. 580; *Griffin v. County of Clay*, 63 Iowa, 413, 19 N. W. Rep. 327; *City of Council Bluffs v. Waterman*, (Iowa,) 53 N. W. Rep. 289. As is well said by Judge Dillon in his excellent work on Municipal Corporations, (volume 1, § 233:) "To allow changes and additions in the duties properly belonging, or which may properly be attached, to an office, to lay the foundation for extra compensation, would soon introduce intolerable mischief. The rule, too, should be very rigidly enforced. The statutes of the legislature and the ordinances of our municipal corporations seldom prescribe with much detail and particularity the duties annexed to public offices, and it requires but little ingenuity to run nice distinctions between what duties may, and what may not, be considered strictly official; and, if these distinctions are much favored by courts of justice, it may lead to great abuse." The demurrer was properly sustained, and the judgment below is affirmed.

**SPEED v. COMMON COUNCIL OF CITY OF
DETROIT et al.**

(58 N. W. 638, 100 Mich. 92.)

Supreme Court of Michigan. April 10, 1894.

Certiorari to circuit court, Wayne county; George S. Hosmer, Judge.

Mandamus, on the relation of John J. Speed, against the common council and comptroller of the city of Detroit, to compel the payment of relator's salary. From an order granting the writ, respondents bring certiorari. Affirmed.

Atkinson & Haigh (Philip T. Van Zile, of counsel), for appellants. John D. Conely and Hoyt Post, for appellee.

PER CURIAM. This is certiorari to review an order of the circuit court directing the payment of relator's salary, under Act No. 419 of the Local Acts of 1893. Four questions are raised:

1. Is mandamus the proper remedy? This point is ruled by *McBride v. Grand Rapids*, 47 Mich. 236, 10 N. W. 353.

2. The answer sets up that the general fund out of which salaries are usually payable is overdrawn, in the sum of \$6,000. It appears, however, that the amount of uncollected taxes is \$21,000, and that the common council had already authorized a loan. There is no doubt of the power of the council to borrow money in anticipation of the collection of the taxes levied. It further ap-

pears that the act creating the department went into effect June 1, 1893, after the annual budget had been determined upon, and that the salary fixed by the act was not anticipated in that budget. The expense, therefore, must be regarded as contingent, and, under the charter, payable out of the contingent fund, which is shown to be amply sufficient.

3. It is contended that the legislature has no authority to fix the salaries of city officers. The constitution (section 38, art. 4) provides that the legislature may confer upon cities such powers of local legislative and administrative character as they may deem proper. The legislature has not, in this instance delegated to the municipality the power to fix the salary in question. The point is, we think, ruled by *Wyandotte v. Drennan*, 46 Mich. 478, 9 N. W. 500.

4. When the act took effect, relator was the then city counselor, under a former appointment. He was reappointed July 15, 1893, and for the months of June and July was paid at the rate fixed by the act. Respondents contend that, for this period, relator was entitled only to the salary as fixed under the former appointment. The act is supplemental, and does not disturb existing officers, but, on the contrary, constructs the department with material then on hand; and the provision respecting salary relates as well to the city counselor acting before the act took effect as to the city counselor subsequently appointed. The order is therefore affirmed, with costs to relator.

BUCK v. CITY OF EUREKA. (No. 15,733.)

(42 Pac. 243, 109 Cal. 504.)

Supreme Court of California. Oct. 10, 1895.

In bank. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Action by S. M. Buck against the city of Eureka for professional services. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

J. N. Gillett and E. W. Wilson, for appellant. Buck & Cutler, for respondent.

HENSHAW, J.¹ * * * * *

The office under consideration was given a potential existence by the acts of the legislature in the sections of the Code above quoted. The plaintiff, having accepted the appointment to it, and received the emoluments of it, is estopped from endeavoring to show to his own advantage that the council did not follow a prescribed mode in perfecting that potential existence. It was therefore error for the trial court to strike out the admitted evidence. It does not seem to be disputed that, if plaintiff's services in the case of Wing Hing v. City of Eureka were such as under his office he was in duty bound to perform, his contract with the council would be void as an attempt to increase his compensation; and, indeed, no question can arise upon this point. It is definitively settled by the language of the constitution, in the first place (Const. art. 11, § 9); and in the second place, even in the absence of such a provision, such a contract would be declared void upon grounds of public policy. "It is a well-settled rule that a person accepting a public office with a fixed salary is bound to perform the duties of the office for the salary. He cannot legally claim additional compensation for the discharge of these duties, even though the salary be a very inadequate remuneration for the services. * * * Whenever he considers the compensation inadequate, he is at liberty to resign. The rule is of importance to the public. To allow changes and additions in the duties properly belonging or which may be attached to an office to lay the foundation for extra compensation would introduce intolerable mischief. The rule, too, should be strictly enforced." Dill. Mun. Corp. (4th Ed.) § 233; Mechem, Pub. Off. §§ 324-376.

The contention here is, however, that these services were not among those whose performance is enjoined on the city attorney, and herein plaintiff relies upon the case of Herington v. Santa Clara Co., 44 Cal. 496. As the law then stood, the district attorney was entitled to receive as compensation 10 per cent. of all money recovered by him for the county in any action. The county supervisors, ignoring the district attorney, authorized other attorneys to bring suit without the county for the recovery of a large sum of money. Re-

covery was had in the action, and the district attorney sued to recover his percentage. The law made it the duty of the district attorney to prosecute all actions for the recovery of debts, etc., and to defend all suits brought against his county. Pol. Code, § 4256. The district attorney was not denying that it was his duty to prosecute this suit, but, to the contrary, insisted that it was his duty. The defendant county never claimed that it was not the district attorney's duty to prosecute the suit, but insisted that the duty was not exclusively imposed upon and the right not exclusively vested in him, but that the supervisors could, if they saw fit, engage other counsel to perform the service, as in many cases special counsel are employed. The language of the court in its opinion, therefore, while not obiter, was not addressed to any contention raised by the parties. The decision of the court was by a bare majority; Chief Justice Wallace being disqualified, and Justice Rhodes expressing no opinion. It was based upon two grounds; the second, which is argued at length, holding that, as the district attorney had not collected the money, he was not entitled to his commission; and the first, which is not argued, being a declaration to the effect that it was "not a duty enjoined upon the district attorney by law to prosecute or defend civil actions in which the county is interested which are pending in any other county than his own." This declaration is, however, supported by no reasoning, by no analysis of the statute, and by no citation of authority; and it would be difficult so to support it. Says Dillon: "The statutes of the legislature and the ordinances of our municipal corporations seldom prescribe with much detail and particularly the duties annexed to public offices; and it requires but little ingenuity to run nice distinctions between what duties may and what may not be considered strictly official; and, if these distinctions are much favored by courts of justice, it may lead to great abuse." Dill. Mun. Corp. (4th Ed.) § 233.

When the law of the state says that the district attorney shall prosecute and defend all suits, and the city attorney shall attend to "all suits, matters and things in which the city may be legally interested" it is a most forced and unwarranted construction to hold that in the one case it means only such suits as are commenced and finally determined in the county courts, and in the other only such as are in like manner commenced and determined in the municipal courts. If the legislature meant that, it could and would have said so. But when it says "all suits, matters and things," the language will bear no other construction than that which is patent on its face. No rules of interpretation are necessary to be considered, for no need or room for interpretation exists. Thus, the court, in Ryce v. City of Osage (Iowa) 55 N. W. 532, said the law made it the duty of the city attorney "to act as attorney for the city in any suit or ac-

¹ Part of the opinion is omitted.

tion brought by or against the city, and generally to attend to the interests of the city as its attorney." There, as here, plaintiff claimed extra compensation for services rendered under contract with the council for defending an action against the city in the district and supreme court, and there, as here, urged that it was no part of his official duty to defend the suit. Says the court: "It seems to us that a mere reading of that section of the ordinance prescribing the duties of the city attorney is sufficient to show that under it he was required to act for the city in any case brought by or against it. * * * That the services rendered by plaintiff, and for which he seeks now to recover, were included within his duties as city attorney, is too plain to admit of argument." In *Lancaster Co. v. Fulton*, 128 Pa. St. 48, 18 Atl. 384, construing a similar statute, say the court: "The services for which the contract in question undertakes to provide are clearly within the sphere of the duties of the solicitor of Lancaster county." *Russell v. Hallett*, 23 Kan. 276, is not in conflict with the authorities upon this question. In that case the county attorney sued his county for compensation for services demanded of him without the duties of his office, as the court decided. He had been compelled to assist in a trial in a county other than his own. The law expressly limited his duty to attending before magistrates and judges in his county. Gen. St. Kan. 1868, p. 284, § 137.

But it is unnecessary to multiply quotations upon this plain proposition. We think it must be apparent that the construction given to the statute in *Herrington v. Santa Clara Co.*, supra, cannot be supported, and should no longer be maintained; and we believe that the evil results to the public service which must arise under that construction justify and demand a declaration from this court that it be no longer considered as authority. It is of the last importance that any and every public officer entering upon the discharge of his duties should know once and for all that, be the duties onerous or be they easy, the compensation for them must be that fixed by law, and that only. If they become too burdensome, the law does not forbid the officer's resignation; but it does emphatically say that he shall not under any circumstances, by use of the power of his office, by contract, express or implied, fair or unfair, or by aid even of legislative enactment, obtain increased compensation for their performance. "The successful effort to obtain office is not unfrequently followed by efforts to increase its emoluments; while the incessant changes which the progressive spirit of the times is introducing effects, almost every year, changes in the character and addition to the amount of duty in almost every official station; and to allow the changes and additions to lay the foundation of claims for extra services would soon introduce intolerable mischief." *Evans v. City of Trenton*, 24 N. J. Law, 764.

The services here performed by the plaintiff

being such as it was his duty to perform as the city attorney of the city of Eureka, the contract was an attempt to increase his compensation, and is in violation of the constitution, against public policy, and therefore void. "A promise to pay them [officers] extra compensation is absolutely void, under the statute of Ohio. Such promise could not be enforced at common law, being against sound policy and quasi extortion. English judges have declared that such are novel in courts of justice, and that actions founded on such promises are scandalous and shameful (2 Burrows, 934); and in the court of errors of New York they meet with no more favor (*Hatch v. Mann*, 15 Wend. 46)." *Gillmore v. Lewis*, 12 Ohio St. 281; *Vandercook v. Williams*, 106 Ind. 345, 1 N. E. 619, and 3 N. E. 113; *City of Decatur v. Vermillion*, 77 Ill. 315; *Hunter v. Nolf*, 71 Pa. St. 282.

Nor can plaintiff recover under the contract, as by his second count he seeks to do, for such part of the services as was rendered after his term of office had expired. This is not the case of a city attorney carrying on litigation, after his term of office had expired, with the knowledge and consent of the authorities, in which case an implied contract and promise to pay might arise after his tenure had terminated. Here plaintiff declares on and seeks to recover under a contract against public policy and wholly void. Such a contract will not support any action for recovery. As is said by the court in *Lancaster Co. v. Fulton*, 128 Pa. St. 48, 18 Atl. 384: "There is no pretense that any new agreement was entered into, or the terms of the original in any manner changed, after the expiration of the term of office. Neither the subject of a new contract nor the modification of the original ever appears to have been considered by the parties. The services of plaintiff below were, no doubt, efficient and valuable; but, as far as they were rendered during his term of office, his salary is all the compensation he can claim. As to services rendered after the expiration of his term of office, under and in pursuance of the original illegal and void contract, he cannot, under the pleadings and evidence in this case, recover." A void contract cannot form the basis of a judicial proceeding. *Lumber Co. v. Hayes*, 76 Cal. 387, 18 Pac. 391.

There are considerations in plaintiff's case which appeal with force to a court. In the first place, the services rendered, as found by judge and jury, were of great value to defendant. In the second place, they were rendered under an early interpretation given to the statute, which justified plaintiff in suing upon his contract. In now declaring what we believe to be the only tenable construction of the law relative to the duties of the office, it has followed as a necessary consequence that the contract, void as against public policy, will not support a cause of action. Plaintiff, however, if the facts will warrant it, should recover, not upon the original or void contract, but upon an implied one for services rendered

after the expiration of his term of office. The judgment and order are reversed, with directions to the trial court to permit plaintiff, if he shall be so advised, to amend his complaint, or file an amended complaint, seeking compensation upon quantum meruit for serv-

ices rendered after the expiration of his term of office.

We concur: BEATTY, C. J.; McFARLAND, J.; GAROUTTE, J.; VAN FLEET, J.; HARRISON, J.; TEMPLE, J.

CITY OF LOUISVILLE v. WILSON. SAME
v. NEVIN. SAME v. HOERTZ. SAME
v. MARTIN. SAME v. O'CONNELL.

(36 S. W. 944.)

Court of Appeals of Kentucky. June 24, 1896.

Appeal from circuit court, Jefferson county.
"To be officially reported."

Cases submitted without action by Charles A. Wilson, by Joseph Nevin, by J. Henry Hoertz, by J. P. Martin, and by J. J. O'Connell, against the city of Louisville. There were judgments for the plaintiffs, and defendant appeals. Affirmed.

W. S. Barker, Fairleigh & Straus, and John W. Barr, Jr., for appellants. Dodd & Dodd, Humphrey & Davie, Carroll & Hagan, and D. W. Baird, for appellees.

LEWIS, J. It is agreed, in these five cases, submitted and decided without action, as follows: Appellees Wilson and Nevin were appointed by the mayor, for the term of four years, December 14, 1893, confirmed by the board of aldermen of Louisville, and immediately qualified as members, respectively, of the board of public safety and board of public works. January 9, 1894, by ordinance of the general council, the salary of each member of the two boards was fixed at \$3,000 per annum. By ordinance approved January 26, 1894, it was provided there should be one secretary of the board of public works, his compensation being fixed at \$2,000 per annum; and January 31, 1896, appellee Hoertz was by the board of public works appointed secretary for the term of four years. By ordinance approved May 21, 1894, it was provided the compensation of deputies of the police court should be \$1,500 each, payable monthly; and in January, 1895, appellee J. J. O'Connell was by J. N. Vetter, bailiff of said court, appointed one of his assistants or deputies. January 9, 1894, by ordinance the compensation of official stenographer of the city court was fixed at \$1,000 per annum; and February 24, 1894, appellee John P. Martin was by the judge of the court appointed to the office. December 26, 1895, the general council, composed of newly-elected members, passed an ordinance, duly approved by the mayor, changing salaries of members of the boards of public safety and public works to \$2,500 each, per annum, that of secretary of board of public works to \$1,200 per annum, that of deputy bailiff to \$1,200 per annum, and that of official stenographer to \$900 per annum.

The main question in this case is whether the ordinance of December, 1895, violates section 161 of the constitution, as follows: "The compensation of any city, county, town or municipal officer shall not be changed after his election or appointment, or during his term of office, nor shall the term of any such office be extended beyond the period for which he may have been elected or appointed." And proper determination of it involves inquiry

whether the various ordinances referred to which first fixed the compensation of these officers were valid and effectual for that purpose. If any of them be invalid at all, it is only because they were passed after the officers affected by them had qualified and commenced discharge of their duties; for all appear to have been regularly passed and approved, under authority conferred by section 2756, St. Ky., applicable to Louisville, a city of the first class, as follows: "Except as otherwise herein provided the general council may by ordinance prescribe the duties, define the terms of office, fix the compensation and the bonds, and time of election of all officers and agents of the city." But as none of those ordinances, except the particular one fixing salaries of members of the board of public health and of the board of public works, were passed subsequent to appointment and qualification of the several officers mentioned, there is no reason for calling in question the validity of any, except it may be that one.

The purpose of section 161 was to prevent as well reduction of compensation of officers, sometimes the result of prejudice and false economy, as increase of it, sometimes brought about by importunity and under influence on their part. So there cannot be any change at all of an officer's compensation during his term. But there is an essential difference, which we are satisfied the framers of the constitution had in mind, between fixing the amount of compensation an officer shall receive, not hitherto ascertained and settled, and changing it after it has been fixed. It is the obvious and uniform policy of government, state and municipal, as well as just to each officer, to fix his compensation definitely and certainly as to amount, except when he is paid by fees of office. And section 161 does not in terms, nor was it intended to, forbid or at all relate to any statute or ordinance that for the first time does fix the salary of an officer. But it is equally necessary, for protection of both the government and officer, that his salary, when once fixed, should not be changed during his term; and for no other purpose than to prevent that evil was section 161 made part of the constitution.

It is, however, contended, that section 2824 and section 2861 had the effect to fix and secure to members, respectively, of the board of public safety and board of public works a definite amount of compensation; the two sections being alike, and as follows: "Each member shall receive a salary of not less than twenty-five hundred dollars." But it is plain the legislature did not intend thereby any more than to prescribe a minimum of the compensation which the general council had been by section 2756 already empowered to definitely and authoritatively fix. And it is to us equally plain that, until the ordinance of January 9, 1894, was passed and approved, the members of the two boards did not have legal right to demand, nor the city treasurer legal authority to pay, them any compensa-

tion whatever. In our opinion the last-named ordinance is valid, and consequently the one of December 26, 1895, must be held invalid.

There can be no question of appellees Wilson and Nevin being officers, in the meaning of section 161, and the remaining inquiry is whether the other appellees are. There are various tests by which to determine who are officers, in the meaning of the law; but at last, in case of uncertainty, the intention of the lawmakers controls. To constitute an officer, it does not seem to be material whether his term be for a period fixed by law, or endure at the will of the creating power. But, if an individual be invested with some portion of the function of the government, to be exercised for the benefit of the public, he is a public officer. Mechem, Pub. Off. § 1. The board of public works is by statute vested, conjointly with the mayor, with executive power, and, as its name indicates, has control and supervision of public places and public improvements, with authority to make contracts in regard thereto. By section 2803 it has power to prescribe rules, not inconsistent with any statute or ordinance, regulating its own proceedings and the conduct of its officers, clerks, and employés, distribution and performance of its business, and preservation of the books,

records, papers, and property under its control; and, while it does not appear, from the agreed statement of facts, what particular duties are assigned to the secretary of the board, it is manifest he was intended to be and is more than a mere employé; for he is required to execute a bond for proper discharge of his duties, and, being next in authority to members of the board, is the proper person to keep the required journal of its proceedings, and preserve books, papers, and records affecting the public. In our opinion, he should be held an officer, in the meaning of section 161. As to appellee O'Connell, performing, as assistant bailiff, the duties of a peace officer, and having authority to serve process and make arrests, there can be no question of his being an officer. Besides, the statute expressly provides for appointment of assistant bailiff, as it does for the appointment of official stenographer, whose official acts have, in degree, the same verity and force as do those of the clerk of the police court. We think appellees are all officers, in the meaning of section 161. Judgment affirmed.

GUFFY¹ and DU RELLE, JJ., dissent.

* * * * *

¹ Dissenting opinion is omitted.

OLDHAM v. MAYOR, ETC., OF BIRMINGHAM.

(14 South. 793, 102 Ala. 357.)

Supreme Court of Alabama. Feb. 8, 1894.

Appeal from city court of Birmingham; H. A. Sharpe, Judge.

Action by John S. Oldham against the mayor and aldermen of the city of Birmingham to recover salary alleged to be due plaintiff as sergeant of police of such city. From a judgment for defendant, plaintiff appeals. Affirmed.

Cabaniss & Weakley, for appellant. H. C. Selheimer, for appellee.

HARALSON, J. This is an action of assumpsit by John S. Oldham, the appellant, against the mayor and aldermen of Birmingham, a municipal corporation, to recover the salary claimed by him as attaching to the office of sergeant of police for said city, which accrued to him from and after the 21st of June, 1893, and which was payable, as alleged, semimonthly. The facts in the case are undisputed. It was tried on an agreed statement, subject to legal objections. The trial was by the court, without the intervention of a jury, and the judgment being for the defendant, on exception reserved to the conclusion and judgment of the court, an appeal is here prosecuted to reverse that judgment. The legislature, at its session of 1890-91, established a new charter for the city of Birmingham. Acts 1890-91, p. 114. Under this charter, the corporate powers of the city were vested in, and to be exercised by, a mayor and 10 aldermen, who constituted the governing body, called the "Board of Mayor and Aldermen," to be elected by the people on the first Tuesday in December, biennially. Prior to 1893, this board had power and control over the police force of the city. On December 12, 1892, the act of the legislature, entitled "An act to establish a board of commissioners of police for the city of Birmingham, Alabama," was approved, by which act, it was made the duty of this board to appoint such police officers and policemen as were or might be prescribed by the city ordinance. On the 12th March, 1893, the police commissioners, having been duly appointed, and qualified under said act, and proceeding thereunder, elected the police force for said city, consisting of a chief of police, a night captain, a day and night sergeant and 26 patrolmen, the day sergeant so elected being the plaintiff, John S. Oldham. These were the police officers and policemen at that time authorized by city ordinance. The board of mayor and aldermen of the city denied the right of said commissioners to elect a police force, and insisted that the then incumbents of police offices had the right to serve during the whole of 1893, (having theretofore been appointed by the city for the year,) and re-

frused to recognize the rights of the appointees of the police commission, (including the plaintiff;) and the then incumbent of the office refused to vacate and yield it to plaintiff. Other appointees were in a like category. Litigation ensued between the appointees and the city, which was finally, on the 20th June, 1893, decided against the city, in the case of Fox v. McDonald, 13 South. 416, in this court. On the 21st of June, 1893, the board of mayor and aldermen adopted the following ordinance: "Be it ordained by the mayor and aldermen of Birmingham, that the offices of day and night sergeants are hereby abolished; that until the 1st day of January, 1894, the police department shall consist of one chief, one night captain, and twenty-six patrolmen." The plaintiff reported for duty to the chief of police, at 12 o'clock on the night of the 21st of June, 1893, who informed him of the passage of said ordinance, to abolish said office, adopted that night, and told him to await further action until they could, on the following day, consult their counsel, and until he could see the police commissioners; that on the following day,—June 22, 1893,—they conferred with their counsel and the police commissioners, and plaintiff went on duty at 6 o'clock a. m., June 23, 1893, and has since been performing his duties as day sergeant,—all of which was done under the direction of the chief of police. There was no dispute as to the time plaintiff served, or the value of the compensation, or as to his having made proper application to the mayor and aldermen to have his name put in the pay roll of the city, or to his having demanded, before suit brought, what he alleged to be due him. The city authorities refused to recognize him as one of the city police force, denied that they owed him anything, and refused to pay him. The sole question for review, as presented by plaintiff's counsel is, "Did the mayor and aldermen of Birmingham have the power, on June 21, 1893, to abolish the office of police sergeant held by plaintiff, and thereby deprive him of his salary during his term, or can the ordinance of that date be accorded the effect of taking away said salary?"

1. Mr. Dillon states the rule to be, that "a municipal corporation may, unless restrained by charter, abolish an office created by ordinance, and may also, unless the employment is in the nature of a contract, reduce or otherwise regulate the salaries and fees of its officers, according to its views of expediency and right." (Italics his.) 1 Dill. Mun. Corp. §§ 231, 232; 19 Am. & Eng. Enc. Law, 526, 535.

2. It seems to be well settled, generally, that the power to create an office includes the power to destroy or abolish it, and that, whenever the people in convention or through the legislature, clothe any department of the government, or any of its boards, or officers, or municipalities with power, at discretion, to create an office, they clothe the body thus

authorized, in the absence of a declaration of purpose to the contrary, with like power to abolish the same office. *Benford v. Gibson*, 15 Ala. 523; *Ex parte Screws*, 49 Ala. 65; *Ex parte Lusk*, 82 Ala. 522, 2 South. 140; *People v. Jewett*, 6 Cal. 691; *Attorney General v. Squires*, 14 Cal. 13; *Ford v. Commissioners*, 81 Cal. 19, 22 Pac. 278; *Phillips v. Mayor*, 88 N. Y. 245; *State v. Kalb*, 50 Wis. 178, 6 N. W. 557; *State v. Smith*, 65 N. C. 369; 19 Am. & Eng. Enc. Law, 526, 555, and authorities cited in notes.

3. There is in this state no constitutional inhibition to the abolition of offices created by statute, nor any protection extended to salaries attaching to such offices. Protection is extended only to such officers as are named in the constitution, whose offices cannot be abolished, and whose compensation is forbidden to be diminished during their official terms. *Perkins v. Corbin*, 45 Ala. 119; *Ex parte Lambert*, 52 Ala. 79.

4. The election of one to a municipal office, and his acceptance of it, cannot be regarded as an engagement or contract between the corporation and himself. He may resign at pleasure, and so, his office may be abolished, or his compensation reduced, or taken away altogether. He accepts the trust, with full knowledge of the power of the legislature or the municipality over the office and its emoluments. *University v. Walden*, 15 Ala. 657; *Com. v. Bacon*, 6 Serg. & R. 322; *Throop*, Pub. Off. §§ 443, 444, 446, 447.

5. If anything were needed, in addition to the clear and repeated utterances of this court, on this subject, in the cases we have cited, the supreme court of the United States has given expression to language, by Justice Daniel, so applicable to this case, we venture to quote it: "The contracts," says the court, "designed to be protected by the tenth section of the first article of that instrument, are contracts by which perfect rights, certain definite, fixed private rights of property are vested. These are clearly distinguishable from measures or engagements adopted or undertaken by the body politic or state government for the benefit of all, and from the necessity of the case, and according to universal understanding, to be varied or discontinued as the public good shall require. The selection of officers, who are nothing more than agents for the effectuating of such public purposes, is matter of public convenience or necessity, and so, too, are the periods for the appointment of such agents; but neither the one nor the other of these arrangements can constitute any obligation to continue such agents, or to reappoint them, after the measures which brought them into being shall have been abrogated as even detrimental to the well-being of the public. The promised compensation for services performed and accepted during the continuance of the particular agency may undoubtedly be claimed, both upon principles of compact and equity; but to insist

beyond this on the perpetuation of a public policy, either useless or detrimental, and upon a reward for acts neither desired nor performed, would appear to be reconcilable with neither common justice nor common sense. The establishment of such a principle would arrest, necessarily, everything like progress in government; or if changes should be ventured upon, the government would have to become one great pension establishment in which to quarter a host of sinecures." *Butler v. Pennsylvania*, 10 How. 416; *U. S. v. Hartwell*, 6 Wall. 385; *U. S. v. Mitchell*, 109 U. S. 146, 3 Sup. Ct. 151.

6. Let the foregoing principles be applied to the facts of this case, as we find them in the record. The charter of the city of Birmingham confers on the mayor and aldermen, the power to "appoint such officers as they may see fit and think necessary for the good government of the city, * * * and to remove and discharge any of its officers and employes at pleasure." (section 18,) and "to appoint and regulate night and day watchmen, police, patrol, and captains thereof, and to maintain a police force of such officers and patrolmen as they may deem necessary," (section 21, subd. 7.) Acts 1890-91, p. 114. Section 14 of the Code of the city of Birmingham provides that "the board, [mayor and aldermen] as soon as practicable after its organization, shall proceed to elect for the ensuing year, the following officers: * * * A clerk, [and other designated officers,] and such number of policemen as the board may see fit, to serve at the will of the board, for one year, or until their successors are elected and qualified." (Italics are ours.) Section 46 provides that "the officers of the city, in addition to mayor and aldermen, shall, until changed by the board, be as follows, [specifying them,] and such number of policemen * * * as the board may determine, all of whom are to be elected annually by the board, to serve at the will of the board, for one year, or until their successors are elected and qualified, beginning on the first of January of each and every year." On the 21st day of June, 1893, the board of mayor and aldermen adopted the ordinance, which we have quoted above, abolishing the office of day and night sergeant. The powers of the board of police commissioners are enumerated in sections 4 and 5 of the act creating them. These powers are scant, and relate entirely to the control of the police of the city. It is made their duty "to appoint a chief of police and such other police officers and policemen as is or may be prescribed by city ordinance," and to "exercise full direction and control of the officers and members of the police force in conformity to existing laws and ordinances, and such as may be made, in the future, applicable to the subject." Section 4. Section 5 gives them power to suspend or remove any officer of the police force or any policeman who fails to perform any du-

ty required of him by law or the city ordinances.

7. By these two sections, the power of the board of mayor and aldermen to make the appointment of these officers, as formerly exercised, was revoked, and the power to suspend or remove them was also taken away. But, it will be observed, that the power to determine what officers and policemen are necessary for the good government of the city, and to carry out the powers granted in its charter, and the power to create and abolish officers, such as the mayor and aldermen theretofore had, was left untouched and as plenary as before.

8. The police commission, as is seen from the act, are authorized to appoint "a chief of police and such other police officers and policemen as is or may be prescribed by city ordinance." They have nothing to do with how large or how small the police force shall be,—whether it shall be, at any time, increased or diminished; have nothing to do with the creation or abolishing of offices, or with the amount of compensation the police officers shall receive, or with the finances of the city, or the city government,—nothing to do, except to overlook the police force and see that they do their duty. When it comes to suspending or removing one of them from office, even, for a failure to perform his duties, it must be done, not by ordinance of their creation, but in the manner, as shall be prescribed by city ordinance. No legislative power, at all, is given to them, but it is all reserved for the mayor and aldermen. The salaries and compensations of these police officers and policemen, as they were before the creation of this police commission, are "to be prescribed by city ordinance, and shall not be increased or diminished during their respective terms." The only difference in the matter of compensation under the new and the old order is, that this latter act inhibits the increase or decrease of the salaries during the terms for which these officers were appointed. As for anything in the act creating this board, the mayor and aldermen are still required, "to maintain a police force of such officers and patrolmen as they may deem necessary," and at such compensation as they may prescribe.

9. The contention of the plaintiff, as stated by his counsel is, that the legislature indicated its purpose in the police commission act to establish a new system of police for Birmingham with protection to salaries and against removal, except for cause after trial, and it is not competent for the mayor and aldermen, during the term of a police sergeant, to indirectly remove him from office or take away all salary, by resorting to the indirect method of abolishing the office. This claims more than is authorized to be presumed, in respect to the action of the city government. We are to presume they did their duty, and acted, as they thought was for the good of the city in abolishing

said office. The act inhibiting the diminution of the salary of the police officers, is limited in its application to the term of the officer, and the inhibition, as to any particular officer, exists only so long as his term of office continues. What then is meant by the word "term" as here employed? The act does not fix the term of office of policemen, or police officers, nor does the charter of the city, nor any legislative act, do so; but it is wisely left to the governmental authority of the city to determine the number and to maintain such a police force "as it sees fit," (Charter, §§ 18, 21;) and the City Code (sections 14, 46) fixes their terms to be, "at the will of the board [of mayor and aldermen,] or for one year, or until their successors are elected and qualified." The term, then, continues only so long as the board of mayor and aldermen wills it shall continue, not longer than a year, if the board does not will to terminate it sooner, or until a successor is elected and qualified. The provision in the police act against an increase or diminution of salaries, can have no application to a case where an office of policeman has been abolished. If the office has been abolished, the incidental and necessary effect is, that the incumbent can no longer discharge its duties, for, there can be no officer, where there is no office, and there can be no salary where there is neither office nor officer.

10. The purpose of the legislature in providing against the removal of policemen by the board of police commissioners, except for cause after due trial, and in a manner to be prescribed by city ordinance, was to prevent injustice and the exercise of an *ex parte*, arbitrary and capricious power, to the injury, perhaps, of a faithful officer, and to give him, at least, an opportunity of having a fair trial, before removal. But, this has no application to the exercise of the power by the city, to create and abolish offices. The judge of one of our city courts cannot be removed for cause, without impeachment after trial, but that does not prevent the legislature from abolishing the court, and thereby depriving the judge of his office and salary. *Perkins v. Corbin*, *supra*. Offices are abolished, it may be presumed, without reference to the incumbents or their conduct,—though that might, properly, be a consideration,—but because they are no longer necessary. Such statutory offices are not to be retained for the benefit of those who fill them, but alone for the public good. *Phillips v. Mayor*, *supra*.

11. A careful consideration of the act creating the police board brings us to the conclusion, that there is nothing in it, in conflict with the power of the mayor and aldermen to create and abolish these police offices. There was no intention of the legislature to substitute the police commission act for the charter of the city in any of its provisions, respecting the government of the city, except in the particulars pointed out above, to

which extent alone, the former is a revision and repeal of the latter, leaving no room for any repeal by implication as contended by appellant. Where there is no conflict or inconsistency between two acts, and both may

be executed without interference with the other, the question of repeal by implication cannot arise. 3 Brick. Dig. p. 750, § 49; Iverson v. State, 52 Ala. 170.
Affirmed.

GUNNING GRAVEL CO. v. CITY OF NEW ORLEANS. (No. 11,252.)

(13 South, 182, 45 La. Ann. 911.)

Supreme Court of Louisiana. April 10, 1893.

Appeal from civil district court, parish of Orleans; Frederick D. King, Judge.

Suit by the Gunning Gravel Company against the city of New Orleans. Judgment for defendant. Plaintiff appeals. Affirmed.

E. M. Hudson and Gilmore & Baldwin, for appellant. E. A. O'Sullivan, for appellee. Farrar, Jonas & Kruttschnitt, as amici curiae.

McENERY, J. Under specifications submitted to it by the city engineer, the city council of New Orleans, by ordinance, directed the comptroller to advertise for sealed proposals for the paving of the wood side of St. Charles street from its intersection with Louisiana avenue to the terminus of the present pavement, on the river side of St. Charles avenue, with Rosetta or Hoskins gravel. On the 26th day of October, 1892, the comptroller advertised for sealed proposals, as directed by the city council, to be received at his office until the hour of 12 M. on Wednesday, November 2, 1892. The advertisement required a deposit of \$50, and a certificate of said deposit to accompany each bid. On the day, November 2, 1892, before the hour of 12 M.,—the limit when said sealed proposals were to be received,—the plaintiff, a foreign corporation, domiciled in the city of Vicksburg, state of Mississippi, owner of beds of gravel in said state, having previously made the deposit of \$50, presented and filed a sealed bid for paving said St. Charles street in accordance with the advertisement. The Rosetta and Hoskins Gravel Companies also presented bids. The plaintiff's bid was the lowest, but was rejected by the city council, and the bid of the Rosetta Gravel Company accepted. There was no answer filed by the city on the rule to show cause why an injunction should not issue, and there is no evidence in the record, other than that of the existence of the plaintiff corporation, the bid, and the acts of the council and the comptroller. There was judgment for the city, and the plaintiff corporation appealed. We are therefore compelled to decide this case mainly upon the facts alleged by plaintiff, and the official acts of the city government.

We infer from the petition that the Rosetta, Hoskins, and Gunning gravel are about of the same quality, and that the names given to the gravel are more to distinguish the several companies than to designate any particular superiority of the gravel. They are not patent processes, exclusively controlled by the owners of the patent, which would exclude competition. They are natural deposits, and there is nothing in the record to show that the bidding

was intended to be confined to the two companies designated in the resolution of the city council and the comptroller's advertisement. The council had the undoubted right to say with what material the streets should be paved. It selected the Rosetta or Hoskins gravel, but did not say that the companies owning the gravel should be awarded the contract. Other persons could have bid to do the paving with this material, and there is no evidence to show that it could not be procured by the bidder from the companies owning the material. The city charter requires that the furnishing of material for public works shall be given to the lowest bidder, but there is a proviso that the council may reject any and all bids. This proviso in the charter was to obtain the work and material at the least possible cost to the taxpayer, after competition; and the proviso was intended for the same public interest and economy, to protect the taxpayer from imposition, and, while inviting competition, to secure good material and responsible contractors. While the city council would not be justified, and the courts would intervene to protect the taxpayer in such event, to arbitrarily reject a bid, and thus defeat the object to be attained by competition, it is vested with a certain discretion in rejecting bids, which will not be controlled, when exercised with prudence in the public interests. In rejecting plaintiff's bid, we are of the opinion that the city council acted with prudence, and in the interest of the taxpayer, to get material which had met with the approval of the taxpayers, and to obtain a responsible contractor. We presume from the circumstances of the case, and the absence of complaint by the taxpayers of New Orleans, although there is no direct proof of the fact, that the two rival companies—the Rosetta and the Hoskins—were well-known contractors and dealers in gravel in the city. The plaintiff is a foreign corporation, and put in an appearance on the last day on which bids were to be received. There is no evidence that it had shown that the gravel owned by it was equal or superior to that of the Rosetta Gravel Company, or that it had given any evidence of its ability to do the paving with skill, and to respond in damages for inferior work. The statements to this effect are *ex parte*, and its ability to do the work skillfully, and to respond in damages, is speculative. Judgment affirmed.

On Rehearing.

(May 27, 1893.)

NICHOLLS, C. J. It would appear from an inspection of plaintiff's petition that it contains two distinct demands, presented in the alternative. On averments by it deemed sufficient to carry with them the nullity of the ordinances authorizing the paving of St. Charles avenue, and everything done thereunder, plaintiff prayed that those ordinances, and all said proceedings, be decreed null and

void; but, anticipating a possible adverse decision upon this demand, it set out allegations of a different character, and prayed that, in the event the ordinances be held valid, then in that event the contract under the ordinance be awarded to it. In refusing plaintiff's accompanying prayer for an injunction the district judge assigned no special reasons, and we are left in doubt as to the grounds upon which he based his action. The opinion which we have rendered in the case shows on its face that we passed by, almost unnoticed, the first branch of the petition, and went directly to the consideration of the second. It was perfectly obvious to us that quoad the action for the declaration of the nullity of the ordinances the plaintiff had no standing in court. The plaintiff described itself as a corporation organized under the laws of Mississippi, and having its domicile at Vicksburg. It did not aver it was doing business in this state, that it had any agent here, that it had any property in New Orleans, or that it paid a dollar of taxes there; and it is quite likely that the judge of division B, finding no allegation tending to show any legal interest in the plaintiff, such as to authorize it to invoke the nullity of the ordinance in question, refused the injunction for that reason. When this court reached (as it did reach) itself that conclusion, the effect of its doing so was, of course, to defeat that portion of plaintiff's demand, independently of any question of the sufficiency, otherwise, of plaintiff's allegations as to the nullity of the ordinances. As throwing the plaintiff out of court on the score of want of legal interest in the question would leave still in court its allegations that the ordinances were null, the logical result, in view of that fact, would have authorized us, under the pleadings, to entirely do away with a discussion of the second branch of plaintiff's petition. Be that as it may, we did in fact discuss it, and held that the district judge acted correctly in refusing the injunction. In discussing the question we took it up in the order and on the "theory" of plaintiff's petition,—that the first branch of the case had been examined into, and passed upon adversely to plaintiff's views, and that it was before us as one where, the ordinances being assumed legal, the rights of the parties were to be determined on other issues. In the very nature of things arising from a discussion from the new standpoint, the court had to do away with every hypothesis and every allegation which had been urged, or could have been urged, on the first branch of the case, and to deal with matters as being (up to the opening of the bids) in *no respect* legal. It was only at that point, and from that point, our discussion began, on the hypothetical premises assumed, of perfect legality in all things prior to that time. Taking up plaintiff's pleadings, and dealing with them as applicable to the second demand, we reached the conclusion that

it was impossible for the district judge to have ruled otherwise than he did. In the application for rehearing filed by the plaintiff, it falls into the error of seeking to carry over, and make available for the second or "contingent" prayer, allegations which, for the purposes of that prayer, have necessarily to disappear.

For the purposes of the second branch of the case, we have to "assume" that the Rosetta Gravel Company, the Hoskins Gravel Company, and the Gunning Gravel Company were each and all fairly allowed to enter into free competition with each other for the paving contract under a valid ordinance, but that the Gunning Gravel Company's bid was the lowest bid of the three, and yet, in spite of that fact, and its ability to furnish all necessary security, the city council awarded the contract to the Rosetta Gravel Company, and that the mayor would sign the contract, under orders from the council, unless restrained by injunction. It was upon this state and condition of the pleadings, and nothing more, that we were called upon to say, "on the face of the papers," whether the district judge was wrong in refusing the injunction. The opinion which we have rendered was from that point of view. Only a few days since, in the case of *Hughes v. Murdock*, 13 South. Rep. 182, we cited the well-recognized doctrine in pleading that up to judgment the pleadings will be taken most strongly against the pleader, and that unknown, unrecited facts would not be assumed in his favor, particularly in the face of an adverse ruling of the district judge. The case at bar falls directly under that principle. The plaintiff asks us to "assume," as an absolutely necessary consequence of its being the lowest bidder for the contract, that it should be awarded to him, and he asks us to assume that fact in presence of the repeated declarations of courts, everywhere, that sworn officers will be presumed to have done their duty,—certainly, at least, until they have been "alleged" to have done otherwise. There is not one single word in plaintiff's petition accusing the common council of New Orleans with having acted arbitrarily, fraudulently, or improperly, in any manner. The plaintiff relies upon the naked fact, advanced by it, that its bid was the lowest, and that its material was equal or superior to that of the other bidders, and that it could furnish security. We are left absolutely in the dark as to the reasons upon which the council acted. We are bound, in the absence of direct charges and statements of facts, to presume that their action was honest and legal. We cannot eke out a case for the plaintiff by inferences of wrongdoing, and make suspicions and conjectures take the place of allegations. While it is possible there was such wrongdoing, it might also well be that the council acted after a very strict examination into all the facts and circumstances which it had the legal right to

examine into, in order to determine whether plaintiff's bid was a proper one, or not, and that these conclusions thereon are justified and right. It may well be that, although the plaintiff "alleges" his ability to furnish security, he may, in fact, never have tendered it at all, or that the security furnished was insufficient. Plaintiff's petition is silent on these points. If the council was guilty of wrongdoing, plaintiff should have directly so alleged, and stated facts and circumstances to show in what way, and from what cause, that wrongdoing arose. We repeat here what we said in the Hughes Case,—that when a plaintiff selects an act as the object of his attack which is not per se necessarily wrongful and illegal, but which may exist consistently with honesty, fair dealing, and legality, it is the duty of the attacking party to set out specifically the facts which would give to the act an illegal or wrongful character. Whatever expressions were used in our opinion to the effect that the council had acted prudently and rightly must be read and construed from the standpoint and from the circumstances under which they were employed. We did not intend to say, as a fact, that the council had so acted, but that for the purposes, exclusively, of this case, as presently placed before us, we were bound to assume they had done so. The fear which plaintiff entertains, that we have committed ourselves to holding that an arbitrary selection by a common council of three or four favored individuals, to whom, and to no others, it would extend invitations to give in bids for contracts, or to a selection of gravel at any particular point or locality, under circumstances such as to make the bids, in reality, but under disguised pretexts, to be nothing more or less than the bids of the

particular persons owning the same, or that we have recognized and given our sanction to the doctrine that a common council, under a grant to accept or reject bids, has the right to arbitrarily and finally reject the lowest bid, or to accept the higher, without any facts justifying such action, is totally unfounded. There is high authority for holding to the contrary. In the case of *People v. Gleason*, 25 N. E. Rep. 5, the court of appeals of the state of New York said: "The claim is made on behalf of the relator that there is a conclusive presumption that the common council adjudicated that his bid was that of the lowest responsible bidder. If this claim be well founded, then provisions like that above quoted [providing that contracts should be let to the lowest bidder] from the city charter are of little use, and they can always be effectually disregarded and violated. It is true that the common council, where there are several bidders, have jurisdiction to determine who is the lowest responsible bidder, but in order to give its action any legal effect it must exercise its jurisdiction, and make a determination based upon some facts. If it refuses to accept the lowest bid for work or supplies, there must be some facts tending to show that it is not that of a responsible bidder, or there must be at least some pretense to that effect. An arbitrary determination by such a body to accept the highest bid, without any facts justifying it, cannot have the effect of a judicial determination, and must be denounced as a palpable violation of law." It was doubtless the intention of the plaintiff to bring this case within the doctrine just announced, but it has not done so in its pleadings, and it is by these that we are now testing matters. Rehearing refused.

CHASE et al. v. CITY OF OSHKOSH.

(51 N. W. 560, 81 Wis. 313.)

Supreme Court of Wisconsin. Feb. 23, 1892.

Appeal from circuit court, Winnebago county; G. W. Burnell, Judge.

Action by Lucy Chase and Mary Chase against the city of Oshkosh. Judgment for plaintiffs. Defendant appeals. Reversed.

H. I. Weed, for appellant. Finch & Barber and F. Beglinger, for respondents.

PINNEY, J. In the case of *Kimball v. City of Kenosha*, 4 Wis. 321, it is decided that the grantee of a lot bounded by a street or streets in a village platted and laid out in conformity with the statute takes to the center of the street on which the lot abuts, subject to the public easement; and this proposition has been repeatedly affirmed in numerous subsequent cases, some of which are cited in *Andrews v. Youmans*, 78 Wis. 58, 47 N. W. 304. The right of the public to use the street for purposes of travel extends to the portion set apart or used for sidewalks, as well as to the way for carriages, wagons, etc., and, in short, to the entire width of the street upon which the land of the lot-owner abuts. As against the lot-owner, the city, as trustee of the public use, has an undoubted right, whenever its authorities see fit, to open and fit for use and travel the street over which the public easement extends, to its entire width; and whether it will so open and improve it, or whether it should be so opened or improved, is a matter of discretion, to be determined by the public authorities to whom the charge and control of the public interests in and over such easements is committed. With this discretion of the authorities, courts cannot ordinarily interfere upon the complaint of a lot-owner, so long as the easement continues to exist; and no mere nonuser, however long continued, will operate as an abandonment of the public right, even though, until needed for a public use, the authorities should treat the street as the property of the owner of the lot. The public authorities, representing its interests, will not be thereby estopped from removing obstructions therefrom, and opening and fitting it for public use to its entire width. *State v. Leaver*, 62 Wis. 387, 22 N. W. 576; *Reilly v. City of Racine*, 51 Wis. 526, 8 N. W. 417; *Childs v. Nelson*, 69 Wis. 125, 33 N. W. 587. The public use is the dominant interest, and the public authorities are the exclusive judges when and to what extent the street shall be improved. Courts can interfere only in cases of fraud or oppression, constituting manifest abuse of discretion. *Benson v. Village of Waukesha*, 74 Wis. 31-39, 41 N. W. 1017; *Wright v. Forrestal*, 65 Wis. 341, 27 N. W. 52; *Pontiac v. Carter*, 32 Mich. 164; *Brush v. City of Carbondale*, 78 Ill. 74. It necessarily follows that for the performance of this discretionary duty by the city officers, in a reasonable and prudent manner, no action can be maintained against the city. *Alexander v. Milwaukee*, 16 Wis.

264. It may well be that had the trees in question been cut down or removed by some third party, not acting under proper authority from the city, he could have been held liable to the plaintiffs in an action for trespass; and it was so held in *Andrews v. Youmans*, 78 Wis. 58, 47 N. W. 304. But this does not tend to show that this action can be maintained for cutting and removing them under the authority of the common council given by resolution to the aldermen of the ward, standing, as they did, within the sidewalk, even without notice to the lot-owner. There was testimony that the plaintiffs had been notified to remove the trees, and they had failed to do so. Complaint had been made for two years previously, to the aldermen of that ward, that the trees were obstructions to the sidewalk; and it is not contended but that they were cut down in good faith, and in pursuance of the authority which the city possesses over its streets and sidewalks. It was admitted at the trial that the trees were cut down by parties acting in good faith, under the authority of the city, and without malice. It was the duty of the city to keep its streets and sidewalks free and clear of obstructions for the use of persons traveling over and along the same; and there can be no doubt but that the city would have been liable in damages to any person traveling along and over the walk in question, in the night-time, who, without fault on his part, had been injured by running against these trees, situated within the limits of the walk. There can be no doubt but that the common council had the right, therefore, to treat them as obstructions to the public travel, and a nuisance, and to abate the nuisance in the manner they did, to protect the public in the lawful use of the sidewalk, and the city from liability for injuries which might be sustained by persons passing along and over it, and who might be injured by such obstructions. Whether the trees were obstructions to travel, and ought to be removed in order to make the sidewalk reasonably safe for travel, was, we think, a matter within the quasi legislative discretion conferred on the common council by the city charter. The charter of the city gives the common council, under various subdivisions of section 3, subc. 6, c. 183, Laws 1883, power, by ordinance, resolution, or by-law, when it deems it expedient, "to prevent the incumbering of the streets and sidewalks," and to "control and regulate the streets, * * * and to remove and abate any obstructions and encroachments therein," and to "protect the same from any encroachment or injury," and "to prevent, prohibit, and cause the removal of all obstructions in and upon all streets in said city;" and the provisions of chapter 52, Rev. St., on the subject of encroachments and obstructions on streets and highways, are not applicable, because special provisions are made in the charter of the city of Oshkosh, inconsistent therewith (Rev. St. § 1347); and by the charter of the city it is provided that "no general law of this state,

contravening the provisions of the charter, shall be considered as repealing, annulling, or modifying the same, unless such purpose be expressly set forth in such law as an amendment of this charter" (Laws 1883, c. 183, subc. 14, § 25); and this provision was in force when the present revision of the statutes was adopted (Laws 1877, c. 123, subc. 13, § 25). Similar provisions have existed in the various charters of cities in this state from an early day.

Inasmuch as the discretion and judgment of the common council in respect to these matters cannot be revised by the court or jury, there being no evidence tending to show an abuse of it, the court ought not to have submitted it to the jury to find whether: "(1) Did said trees incommode or hinder the public use and enjoyment of said street or sidewalk? (2) Did said trees injure said street or sidewalk, or interfere with travel?" It was not seriously contended on the part of the plaintiffs but that the city authorities might authorize the removal of the trees; but it was claimed that they constituted an encroachment, and were not obstructions to the walk or street, and that they could not be removed without a hearing on notice. An encroachment is a gradual entering on and taking possession by one of what is not his own; the unlawful gaining upon the rights or possessions of another. The fencing in or inclosing of a portion of a street or highway by a fence or wall, or the occupancy of it, would be an encroachment; and, as there may be uncertainty as to the exact line of the street or highway, it may be necessary, in order to remove it, that notice be given, so that the question of encroachment may be first passed upon by a jury. An obstruction is a blocking up; filling with obstacles or impediments; an impeding, embarrassing, or opposing the passage along and over the street,—and, to constitute it such, it need not be such as to stop travel. The provisions in the city charter on the subject of encroachments and obstructions of streets and sidewalks give very extensive and comprehensive powers to the common council, of a quasi legislative character, but

without any particular directions as to the manner of their exercise; and these powers are peculiarly adapted to the needs of a growing and populous village or city. They are not only very comprehensive and far-reaching, but they clearly extend to the cutting down and removal of the trees in the manner adopted in the present instance, as they were manifestly obstructions to the sidewalk, although room was left on the walk for foot travel to pass. It was not necessary, in order that they should constitute an obstruction, so as to authorize their removal, that they should interrupt or stop travel. The case of *State v. Leaver*, 62 Wis. 392, 22 N. W. 576, is decisive on this subject. It surely cannot be maintained that the plaintiffs have the right to plant and maintain other trees in their place within the sidewalk, or that other lot-owners can plant in like manner and maintain trees thus situated. As already stated, the plaintiffs had a right of property in the trees, in the sense that they might have cut or removed them, or maintained an action against any one who did so, not acting under authority of the common council; but it does not follow that they had the right to keep and maintain them, standing within the sidewalk, in defiance of the resolution of the common council, insisting, in the interests of the public, upon their removal. The case of *Pauer v. Albrecht*, 72 Wis. 416, 39 N. W. 771, is clearly not in point; for it was a case of an encroachment, and the charter did not contain provisions authorizing the removal of encroachments, and the proceedings had to be, if at all, under the general statute. A permanent obstruction, such as trees standing within a sidewalk or traveled street, or stone columns which may interfere with public travel, constitutes per se a public nuisance, and may be summarily removed by direction of the common council.

The circuit court, upon the entire case, ought to have directed a verdict for the defendant. For these reasons, and for error in refusing the instructions asked by the defendant, the judgment of the circuit court must be reversed. The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

STATE v. GARIBALDI. (No. 11,019.)

(11 South. 36, 44 La. Ann. 809.)

Supreme Court of Louisiana. April 4, 1892.

Appeal from recorder's court of Orleans; A. M. Aucoin, Judge.

Prosecution against Louis C. Garibaldi for the violation of an ordinance of New Orleans prohibiting the establishment of private markets within certain limits. From a judgment on conviction, defendant appeals. Reversed, and suit dismissed. Rehearing refused.

W. J. Waguespack and Joseph F. Poche, for appellant. Branch K. Miller, for the State.

BREAUX, J. The lawmaking power having authorized the city council of New Orleans to pass such ordinances for the government and regulation of private markets as they may in their discretion deem proper, and having vested them with authority for their enforcement, subject to certain limitations, the city adopted ordinance 5748, C. S., and amended ordinance 5798, prohibiting the establishment of a private market for "the sale of meat or other comestibles" except fruits, without permission previously obtained on a petition, with the written consent of a majority of the property owners within 600 feet of the place selected to open a private market; and further prohibiting said market unless the building has proper flagging and ventilation, and measures not less than 10 by 15 feet in area and 16 feet in height, and with no dwelling on either side nearer than 10 feet. From the sentence and judgment finding him guilty of having violated the said ordinances, and condemning him to pay a fine of \$10, defendant appeals.

The following are the agreed facts: The defendant carries on a private market without the permission of the council, in a building measuring 20 feet in width by 30 feet in depth, having three openings in front, 11 feet in height by 4 in width, and two doors in the rear, 10 feet high by 3½ feet wide, opening on a yard 40 feet in depth. The floor of the building is of wood. It is a three-story building, 55 feet in height, the lower ceiling being 11 feet from the floor. It is one of a continuous row of buildings with ceiling about the same height, separated by a single wall between each tenement. On one side of the private market is a boarding house nearer than 10 feet, and on the other a warehouse in which goods are stored. It is in a populous district of the city. The defendant has paid his license. It is further admitted that he has complied with the ordinances relative to private markets preceding those under which he is prosecuted, and that he established his said private market long prior to the adoption of the said ordinances. Testimony was admitted to prove that wooden flooring is preferable, as being more

healthy to stand on than a flagging. It was shown that slats or planks are used to stand on on flag floors. The plaintiff controverted this testimony, and examined witnesses, who testified with some particularity with reference to the unhealthiness of wooden floors, and their inferiority in many respects to pavement, in a market house. The defendant's plea in bar, filed preliminarily, was overruled, in which he urged that the ordinances under which the prosecution was instituted confer arbitrary power on certain property owners to give or to withhold their consent, and are an unjust discrimination, a monopoly, and grant of exclusive privilege, in violation of the constitutions of the United States and of this state; that they are prohibitive and favorable to the lessees of the stalls in the public markets; that the ordinances themselves violate the act of the legislature No. 116 of 1888, authorizing the government and regulation of private markets; that to compel him to carry on his private market in a building with paved floor, and of the dimensions required by the ordinances, is unreasonable and oppressive, ultra vires; that his private market was authorized by ordinance 4145, and his rights as the keeper of a private market cannot be affected by subsequent ordinances. The legislature has often delegated authority to municipal corporations to impose restraint upon the vending of fresh meats and vegetables. It has frequently been the cause of litigation, but it has generally been held to be reasonable. With reference to private markets, the power to prohibit their establishment within a certain number of squares of the public markets was ably opposed in the courts. It is now settled that there was no ground of complaint of the violation of a private right. The right of the sovereign to exercise the police power to maintain the cleanliness and salubrity of a city does not admit of question. Markets require restraint, to prevent their becoming injurious to the public. All regulations requiring ventilation of the building in which markets are opened, about laying of floors, and ordering that reasonable space be provided between the buildings, adopted in the interest of public health, are unobjectionable if not arbitrary, and if they do not discriminate against private rights. If, however, the defendant were to comply with all the regulations emanating from the council relating to private markets, to which we have just referred, he would still have to present a petition to the council, accompanied by the written consent of a majority of the property owners within 600 feet of the place selected to open a market, otherwise it would not be possible for him to continue his business. The consent of certain property owners is made an absolute condition to granting the right. The council's discretion in governing and regulating private markets does not authorize them to confer the right on the majority of property

owners to determine whether a proposed market shall be opened. The special law under which the ordinances were adopted provides that the council shall not prohibit private markets within the populous districts of the city. It may be that the property owners will refuse their signatures without sufficient cause, and thereby prevent the establishment of a private market, despite the rights guaranteed under the terms of the statute. Certain police power is vested in the council to make, ordain, and establish all manner of wholesome and reasonable ordinances not repugnant to the constitution as they shall judge to be for the good and welfare of the public. The responsibility is with them, and the authority cannot be delegated to a majority of property owners in a locality. They are the trustees appointed to legislate and administer in their respective capacity, and cannot divest themselves of their responsibilities by requiring that

the consent of property owners be obtained to open a legitimate business. Cooley, Const. Lim. p. 249. The representative system is a substantive and valuable institution in organized politics. It must maintain its protecting authority against unjust discrimination and arbitrary action. The legislative powers delegated are regarded as trusts, and are not subject to be delegated by those to whom it is confided. 15 Am. & Eng. Enc. Law, p. 1043. "An ordinance of a municipal corporation, which violates any of the recognized principles of legal and equal rights, is necessarily void so far as it does so." State v. Mahner, 43 La. Ann. 496, 9 South. 480. One of the conditions imposed being illegal, the plaintiff cannot maintain its judgment. It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and the suit of the city against the defendant be dismissed, with costs of both courts.

TOWN OF TRENTON v. CLAYTON et al.

(50 Mo. App. 535.)

Court of Appeals of Kansas City. June 13, 1892.

O. M. Shanklin and McDougal & Sebree, for appellant. Harber & Knight, for respondents.

GILL, J. From the agreed statement of facts, it appears that Davis & Co. were dealers in general merchandise, with stores at Trenton, Mo., and Atchison, Kan. The defendants were employed as salesmen; and, in the effort to sell the goods of their employers, they took samples of various articles, visited the different residences in Trenton, and secured written orders for the goods of Davis & Co. The merchandise was subsequently delivered and paid for. The goods carried around were not sold nor offered to be sold, but were simply used to exhibit to customers the character of goods kept and for sale by Davis & Co.

The defendants were charged with selling goods as peddlers in the town of Trenton without a license, contrary to the provisions of an ordinance of said town relating to peddlers. Section 1 of said ordinance reads thus:

"Sec. 1. Any person who shall engage in selling any drugs, medicines, dry goods, groceries or personal property or merchandise, except books, maps, charts and stationery, by going from place to place to sell the same, or shall sell the same by first taking an order and afterwards delivering the article, either in person or by an agent, or shall sell the same by public out-cry in the streets of said town, is declared a peddler." Sections 2 and 3 prohibit any one from acting or dealing as peddler unless permission therefor be obtained from the mayor of said town. Section 4 provides as follows:

"Sec. 4. The mayor is hereby authorized to grant permission to any worthy resident of the town of Trenton to deal as a peddler upon payment to the marshal of a license fee to be fixed by the mayor on granting the same, and the amount of license in all cases shall be fixed by the mayor, provided that the license so fixed shall in no case be less than \$1, nor more than \$100, for every period of six months or fraction thereof."

Section 5 provides a penalty for violation of the terms of the ordinance.

The case was submitted to the circuit court on an agreed statement incorporating substantially the foregoing facts. There was a judgment for defendants, and the town has appealed.

The ordinance which forms the basis of this prosecution is, in our opinion, clearly invalid, and for more than one reason. In the first place, the town council in the ordinance quoted has gone beyond the powers delegated by the legislature. By the charter of Trenton (Laws 1872, p. 481) it is enacted that "the town council shall have power, within said town,

by ordinance, not repugnant to the laws of the land, * * * to license, tax, regulate or suppress * * * peddlers," etc. It is well understood that municipal corporations can exercise only such powers of legislation as are given it by the law-making power of the state. The grants of such powers are quite strictly construed, and "any fairly reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied." 1 Dill. Mun. Corp. (4th Ed.) § 89. As the municipal corporation cannot legislate regarding any subject-matter unless so authorized by the state, so is the corporation powerless to extend or widen the scope of its powers by the arbitrary and unauthorized definition of words or terms, so as to include more than was intended by the legislature.

These remarks are suggested by a consideration of section 1 of the above-quoted ordinance, whereby the town council of Trenton has attempted, by extending the meaning of peddler, to widen the scope of its authorized legislation. Peddler, as meant by the legislature, in granting powers to the corporation of Trenton, included only such persons as "shall deal in the selling of merchandise (and other articles) by going from place to place to sell the same," etc. (Rev. St. 1889, § 7211); and this we held in *State v. Hoffman*, 50 Mo. App. 585, did not include commercial agents or drummers, such as were these defendants. However, the town council of Trenton has, by the ordinance above, sought to regulate or license other and different employments, by extending the meaning of peddler, as used and understood by the legislature, by adding the words, "or shall sell the same by first taking an order and afterwards delivering the article, either in person or by an agent, or shall sell the same by public out-cry in the streets of said town."

Again, the ordinance in question is objectionable, in that it assumes to transfer or delegate to the mayor a power given to the council. The charter of Trenton, as already quoted, reposed authority in the town council by ordinance to license, etc., peddlers. This ordinance turns over the entire matter to the caprice or discretion of the mayor. It leaves the granting or not granting peddlers' licenses—to whom, for what period, and for what cost—altogether with the town mayor. "The principle is a plain one, that the powers or trusts devolved by law or charter upon the council or governing body, to be exercised by it when and in such manner as it shall judge best, cannot be delegated to others." Neither can this ordinance find any support from the thirteenth clause of plaintiff's charter, which empowers the council "to pass all such ordinances as may be expedient in maintaining the peace, good government, health, and welfare of the town." The authority to pass such ordinance must affirmatively appear in the charter. It is not to be inferred from terms of such doubtful import. *City of St. Paul v. Stultz* (Minn.) 22 N.

W. 634; Cape Girardeau v. Fougeu, 30 Mo. App. 557. It follows, then, from the foregoing considerations, that the judgment of the lower court should be affirmed. It is so ordered. SMITH, P. J., concurs in this opinion. ELLISON, J., concurs in the result.

TAYLOR et al. v. BAY CITY ST. RY. CO.

(45 N. W. 335, 80 Mich. 77.)

Supreme Court of Michigan. April 11, 1890.

Appeal from circuit court, Bay county, in chancery; George P. Cobb, Judge.

Bill for injunction by Robbins B. Taylor and others against the Bay City Street Railway Company. Decree for defendant and complainants appeal.

T. A. E. Weadock, for appellants. Hatch & Cooley, for appellee.

GRANT, J. The defendant was organized February 21, 1865, under an act of the legislature providing for the organization of train-railway companies, enacted in 1855. How. St. c. 94. This act was amended in 1861 by adding two new sections. Laws 1861, p. 11. This amendment provided that it should be competent for parties to organize companies under the act to construct and operate rail-ways in and through the streets of any town or city in the state, and that they should have the exclusive right to use the same, upon obtaining the consent of the municipal authorities of such town or city. A further amend-ment, in 1867, provided that, after such consent was given and accepted, such municipal authorities should make no regulations or conditions whereby the rights or franchises so granted should be destroyed, or unreasonably impaired, or such company or corporation be deprived of the right of constructing, main-taining, and operating such railway in the street in such consent or grant named, pur-suant to the terms thereof. Bay City was in-corporated by special act of the legislature in 1865, taking effect March 21. Laws 1865, p. 735. The charter provided that the common council should have power to grant charters, licenses, and privileges to companies, corpo-rations or persons for the construction of street railways on the streets of said city. In 1869 the charter of Bay City was amended. 2 Laws 1869, p. 561. Section 98 of this act provided that the common council should have power to authorize the running of railroads and street railways in the streets of said city upon condition that the owners of the lots ad-joining, and persons interested therein, should receive compensation therefor. This act also conferred other powers of control over such railways which were not conferred by the act of 1865, but it is unnecessary here to specify them. This provision has been retained in the charter ever since. December 14, 1864, the common council of the village of Bay City passed an ordinance conveying to certain persons therein named, who then proposed to or-ganize a corporation under the train railway act, above mentioned, the right to use all the streets in the village of Bay City or its suc-cessor, exclusive of every other person or cor-poration, for the purpose of constructing and operating railways thereon. It provided that cars should be drawn by animals or by steam,

made regulations for the running of trains, etc., and provided that the common council, when deeming it for the interest of the vil-lage or its successor, might order the construc-tion of a railway on any street, and the cor-poration should build the same within two years after being notified, and in default there-of the council might declare the grant void as to such street. The defendant organized, as above stated, in February, 1865, and during that season laid tracks, and commenced the operation of its road, extending the same from time to time as the common council, and the requirements of the public, demanded. July 5, 1887, the common council adopted resolu-tions requiring the defendant to construct a line of railway on Third street, and some oth-er streets mentioned. On June 5, 1888, the common council appointed a committee to draft certain amendments to the street rail-way ordinance. They had a consultation with the proper officers of the defendant, and on June 25th made a written report stating that the defendant proposed to build a track on Third street, between Water street and Wash-ington street, and recommended that the prop-osition of the company be accepted. The re-port was adopted, and thereupon the defend-ant immediately commenced the work of lay-ing the track.

The complainants are the owners of sep-arate lots on Third street, and the buildings situated thereon, used for business purposes. Upon the commencement of the work the com-plainants united, and filed the bill in this case, claiming that the construction of the road would be a damage to their property; that this street was not wide enough for the busi-ness then being done upon it; that no compen-sation had been paid or offered to any of the complainants, nor any steps taken to condemn a right of way through said street,—and prayed for an injunction to restrain the con-struction of the road. A preliminary injunc-tion was granted by the court below, which was set aside upon the filing of the answer. The case was then heard upon pleadings and proofs, the bill dismissed, and complainants appealed. The testimony upon the question of damages is very conflicting. It is unneces-sary to discuss it here; for, if the complain-ants are entitled to recover damages, they must be left to proceedings under the statute to de-termine what damages, if any, they have in-dividually sustained by the construction of the road.

1. Complainants were alike affected by the construction of this road. They were alike interested to restrain its construction. Their interests were therefore common. There was but one object to be accomplished, and no nec-essity existed for a multiplicity of suits. The defendant was not prejudiced by the joinder of complainants. We see no objection to par-ties joining in a suit, the sole purpose of which is to obtain an injunction to restrain the com-mission of an act threatened by one party, and alike injurious to the interests of all.

2. The defendant contends that, by the ordinance of 1864, and the legislation authorizing it, it acquired the fixed and vested right, for a period of 30 years, to use the streets for the purpose of constructing and using a street railway without compensating adjoining owners, and that any subsequent legislation requiring it to compensate in damages for any injuries sustained thereafter by the construction of new tracks is void as impairing the obligation of contracts. It becomes, therefore, important to determine the power conferred by the legislature upon the common council of Bay City. The council can, of course, confer no greater right upon the defendant than is authorized by its charter. Municipal corporations derive their sole source of power from legislative enactments. The rule has been long and unquestionably established that municipal corporations are limited to those powers which are granted—First, in express words; second, necessarily incident to the powers expressly granted; and, third, those which are essential and indispensable to the declared objects and purposes of the corporation. 1 Dill. Mun. Corp. § 89. By the village charter, the common council was authorized to lay out and establish, vacate, open, make, and alter such streets as they might deem necessary for the public convenience. No mention is made in the act of train or street railways. The act incorporating the city provided that all the acts and ordinances of the common council of the village of Bay City not inconsistent with the laws of this state shall remain in full force until changed by the common council of the city; and the same section gives the power to grant charters to street railway corporations. These charters do not in express terms confer upon the council any such power as is now contended for. If it exists at all, therefore, it must be by implication. The power to grant immunity to such corporations from legislative regulation and control is an important one. A village of a few hundred inhabitants may in much less than 30 years grow to a city of many thousands. Bay City well illustrates this fact. What in the one would cause no damage might in the other cause great damage. The vil-

lage council cannot well provide regulations and ordinances applicable to a large city. It is, therefore, highly important that the legislature should retain the power to pass enactments for the control of these quasi public corporations suitable to the changed state of affairs. Those who claim immunity from such control must be able to point to the clear enactment of the statute establishing it. In the case at bar, as already stated, no such express power can be pointed out; and it was neither necessary, essential, nor indispensable to enable the municipal corporation to carry out the objects and purposes for which it was created. It is clearly within the power of the legislature to provide that street railway corporations shall pay such damages to owners of abutting property in front of which they construct their road as this construction will cause. It follows, therefore, that the defendant accepted its charter subject to the right of the legislature to prescribe conditions under which it might thereafter obtain the use of the streets of the city for the construction of new lines. The act of 1869, above mentioned, expressly limited the power of the council to authorize the running of street railways in the streets of the city upon the condition of compensation to owners of the lots adjoining. The act of the legislature of 1881, revising the charter of Bay City, provided that the method of arriving at the compensation to be paid to the lot-owners shall be the same as provided by the general railroad laws of the state. The defendant was subject to the above provisions in making the extension of its road now in dispute.

The conclusion above reached renders it unnecessary to determine the other questions raised in the case, and we pass no opinion upon the liability of the defendant at the common law. The decree must be reversed, with the costs of both courts, and decree entered here restraining the defendant from the use of that part of its road extending on Third street between Water and Washington streets, until it has complied with the statute requiring condemnation proceedings, but giving a reasonable time for that purpose. The other justices concurred.

TOWN OF NEWPORT v. BATESVILLE & B. RY. CO.

(24 S. W. 427, 58 Ark. 270.)

Supreme Court of Arkansas. Dec. 9, 1893.

Appeal from circuit court, Jackson county; James W. Butler, Judge.

Action by the Batesville & Brinkley Railway Company against the town of Newport on a contract for the construction of a levee. From a judgment for plaintiff, defendant appeals. Reversed.

John M. Moore, for appellant. U. M. & G. B. Rose, for appellee.

HUGHES, J. The facts in this case are substantially as follows: The town of Newport made a contract with the Batesville & Brinkley Railway Company to construct a levee on two sides of the town to protect it from overflow, and was to pay the company therefor, in the warrants of the town, \$10,000, and the railway company was to have the privilege of using the levee as a roadbed for its railway. One line of the levee was completed, accepted, and paid for by the town, after which it declined and refused to accept and pay for the other line of the levee, one of these lines being north, and the other south, of the town. The company having, as it contends, completed the levee according to the contract, brought this suit to recover a balance of \$4,450, which it alleges to be due on the contract. There is also a quantum meruit count in the complaint, for work and labor done, and materials furnished, in constructing a levee at the instance and request of the town. The town answered, admitting that it attempted to execute the contract, but says the contract was made for the purpose of inducing the railway company to locate and construct its road through the town, and to establish one of its principal stations there, and denies the power of the town to make the contract. It also denies that the levee was constructed for its use, or at its request, and says that it was constructed for the use of the railway company. It also says that the work was not done according to contract; and that the work and materials of the railway company were not of the value alleged; and that it had paid full value for all work done and materials furnished. The cause was submitted to a jury upon the evidence in the case, and instructions by the court recognizing power in the town council to make a contract to construct a levee. All proper exceptions were preserved to the instructions given by the court, and to the court's refusal of instructions, in effect denying power in the town council to make the contract. The fifth instruction given by the court, to which exception was saved, is as follows: "The jury are instructed that if they find from the evidence in this case that the defendant

entered into a contract with the plaintiff to pay it \$10,000 in town warrants for the construction of a levee described in the written contract made with the defendant, together with its crossings and drains, and under that contract the plaintiff, with the full knowledge and consent of the defendant, under the supervision of its council or a committee appointed by it, proceeded to construct said levee under said contract, with the privilege of using it as a roadbed or railroad track, and to keep the same in proper repair, and the plaintiff did so construct, use, and keep the same in repair, so far as permitted by the defendant, they will find for the plaintiff whatever may be shown to be due and unpaid under said contract." The jury found specially that the railway company, in constructing the levee around the town, had complied substantially with the contract sued upon, and returned a verdict for the railway company. The appellant seeks to reverse this judgment on appeal to this court.

Had the incorporated town of Newport the power to make the contract which was the foundation of this suit? In 1 Dill. Mun. Corp. § 89, it is said: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied." In *Spaulding v. City of Lowell*, 23 Pick. 71, 74, Chief Justice Shaw, in speaking of municipal and public corporations, says: "They can exercise no powers but those which are conferred upon them by the act by which they are constituted, or such as are necessary to the exercise of their corporate powers, the performance of their corporate duties, and the accomplishment of the purposes of their association." "It is proper, too, that these powers should be strictly construed, considering with how little care chartered privileges are these days granted." *Bank v. Town of Chillicothe*, 7 Ohio, pt. 2, pp. 31, 35; *Port Huron v. McCall*, 46 Mich. 565, 10 N. W. 23. "They act, not by any inherent right of legislation, like the legislature of the state, but their authority is delegated, and their powers, therefore, must be strictly pursued." Is there any express grant of power to an incorporated town to make a contract for the building of a levee? Section 740, Mansf. Dig., provides that "the city council shall have power to establish and construct and to regulate landing places, levees," etc. Section 8 of the incorporation act of March 9, 1875. This refers to cities of the first and second class, but not to incorporated towns. Their powers are not always the

same. In enumerating the powers of municipal corporations of all classes in section 18 of the act of March 9, 1875, the power to construct levees is not given, though, as we have seen, it is given in section 8 of the act to cities of the first and second class. It follows, therefore, that there is no express grant of power to incorporated towns to construct levees.

Construing the powers of municipal corporations strictly, does it appear beyond "any fair, reasonable doubt" that the power of an incorporated town to make a contract for the construction of a levee exists? Is such power "necessarily or fairly implied in or incident to the powers expressly granted," or is such a power "essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable?" It does not appear to us that it is necessary that an incorporated town should possess such a power, in order to the exercise of its corporate powers, the performance of its corporate duties, and the accomplishment of the purposes of its organization. Unless such is the case, the power is not implied from the grant of general powers to an incorporated town. *Spaulding v. City of Lowell*, 23 Pick. 71, 74. No "long-established and well-settled usage" appears to have existed with incorporated towns to exercise the power to construct levees. In *Minturn v. Larue*, 23 How. 435, the court said: "It is a well-settled rule of construction of grants by the legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the acts, or derived therefrom by necessary (fair and reasonable) implication, regard being had to the objects of the grant. Any ambiguity or doubts arising out of the terms used by the legislature must be resolved in favor of the public." *Thomson v. Lee Co.*, 3 Wall. 327. In *Leonard v. City of Canton*, a good reason is given for the rule that grants to corporations by the legislature should be strictly construed. It is because they "are invested with a portion of the authority that properly appertains to the sovereign power of the state," and the state never surrenders its just authority save by grants that are clear and unambiguous. 35 Miss. 189. When the exercise of power by a municipal corporation will result in the imposition of burdens or taxes upon the inhabitants, the existence of the power ought to be clear, beyond a fair, reasonable doubt. A different rule might lead to mischievous and oppressive consequences. We are of the opinion that the incorporated town of Newport, in making the contract for the construction of the levee in this case, acted

without either express or implied power, and that the contract was therefore void.

Was the contract such as could be ratified by accepting the benefit of work done under it, or is the town estopped by permitting the work to be done under it, and accepting the benefit of such work? In *Schunm v. Seymour*, 24 N. J. Eq. 144, it is said: "It is a general and fundamental principle of law that all persons contracting with a municipal corporation must at their peril inquire into the power of the corporation or its officers to make the contract, and a contract beyond the scope of the corporate powers is void." "The doctrine of equitable estoppel has no place in a case, where usurped powers have been exercised by municipal officers, who in doing so were contravening public policy, as well as known, positive law." "Where officials are acting within the terms of their delegated powers, though they may be acting carelessly, negligently, or in culpable betrayal of their trust, they are the agents of those whose property is liable to be charged, and if the latter acquiesce in or fail to interpose, when the negligent or culpable conduct of their agents is open to their view, they will not afterwards be allowed to set it up when the effect of so doing will be to subject innocent parties to the burden that would otherwise fall upon themselves." Judge Dillon, in section 463, 1 Dill. Mun. Corp., states the law in this behalf plainly and tersely, thus: "A municipal corporation may ratify the unauthorized acts and contracts of its agents or officers which are within the scope of the corporate powers, but not otherwise. * * * But a subsequent ratification cannot make valid an unlawful act, without the scope of corporate authority. An absolute excess of authority by the officers of a corporation, in violation of law, cannot be upheld, and, when the officers of such a body fail to pursue the requirements of a statutory enactment under which they are acting, the corporation is not bound. In such case the statute must be strictly followed. And a person who deals with a municipal body is obliged to see that its charter has been fully complied with. When this is not done, no subsequent act of the corporation can make an ultra vires contract effective." Note 1, and cases cited. As the contract sued on in this case was without the scope of the corporate powers of the incorporated town of Newport, it could not be ratified, and the town was not estopped to deny its invalidity by having accepted and received the benefit of work done under it, with the knowledge and consent of the town. The judgment of the circuit court is reversed, and judgment will be rendered here for the appellant.

COOMBS et al. v. MacDONALD et al.

(62 N. W. 41, 43 Neb. 632.)

Supreme Court of Nebraska. Feb. 5, 1895.

Appeal from district court, Douglas county; Ferguson, Judge.

Action by Henry Coombs and others, on behalf of the citizens of Omaha and all others desiring to become parties, against Alexander MacDonald and others, the mayor and board of health of the city of Omaha, and the city council of the city of Omaha. Judgment for complainants, and defendants appeal. Reversed.

Saunders, Macfarland & Dickey, for appellants. Robt. W. Patrick and Brent K. Yates, for appellees.

POST, J. This is an appeal from a decree of the district court for Douglas county, and involves the contract for the removal of the garbage of the city of Omaha, which was the subject of the controversy in *Smiley v. MacDonald* (Neb.) 60 N. W. 355. By the decree appealed from, said contract, as well as the ordinance upon which it depends, was adjudged void, and the defendant MacDonald, as contractor, perpetually enjoined from interfering with the plaintiff, also engaged in the business of removing garbage from said city. The grounds upon which said contract is assailed in the petition of plaintiffs are: First, that it was procured through bribery and other unlawful and corrupt means by MacDonald and others interested with him; second, that, in so far as it purports to confer upon the contractor the exclusive right to remove the garbage of the city, it contravenes the settled rules of public policy, and is therefore void. The district court sustained the latter contention only, and, in the language of the decree, "expressly reserving any decision upon the allegations of the petition that the said contract was secured by fraud, procurement, and illegal inducements offered to and accepted by members of the city council." It is a rule of universal application to appellate proceedings that the examination by the reviewing court, whether on appeal or by writ of error, will be confined to issues determined by the court of primary jurisdiction. A party desiring the judgment of this court upon a question raised by the pleadings should first present the subject for the determination of the district court, and secure such a final judgment or decree as may be made the foundation for proceedings by error or appeal. Civ. Code, § 581. Had the plaintiffs so requested, we have no doubt the decree of the district court would have been made to respond to all of the issues presented. If they are on the evidence in the record entitled to

relief on the ground of fraud, the finding upon that issue would have been in their favor. But, however that may be, the original jurisdiction of the court is clearly defined by law, and does not include actions for relief on the ground of fraud to which the state is not a party. See section 2, art. 6, Const.

2. Aside from the allegation of fraud, the pleadings herein present no question which was not considered in *Smiley v. MacDonald*. It is true that, in the case named, the contract was assailed on the ground that the right conferred thereby was an exclusive franchise, and therefore within the inhibition contained in section 15, art. 3, of the constitution; while in the case before us, as we have seen, the contention is that said contract is void as against public policy. Counsel for defendants have cited numerous cases which assert the common-law doctrine that monopolies are odious, and therefore illegal. But they refer without exception to franchises and agreements in restraint of trade, and can have no application to mere police regulations, designed to promote the health or morality of the general public. Almost every phase of the subject was discussed in the celebrated *Slaughter House Cases*, 16 Wall. 36, and 111 U. S. 764, 4 Sup. Ct. 652, to which an extended reference is made in the brief of defendants; and the doctrine therein announced fully sustains our conclusion in *Smiley v. MacDonald*. Indeed, there was in those cases no diversity of opinion among the judges with respect to the authority of a state in the exercise of its police power to confer upon an individual or corporation a privilege in its nature exclusive. On the other hand, the dissent of the non-concurring judges was placed upon the ground that the claim of a sanitary regulation was a mere pretense, under which the state of Louisiana had attempted to invade private rights, and to deny to its citizens the privilege of engaging in a lawful business in no wise affecting the public health or morals. As intimated in *Smiley v. MacDonald*, the choice between sanitary measures is a function of the legislative department of the government, which the courts will not assume to control. The test, as therein remarked, where a particular measure is called in question, is whether it has some relation to the public welfare, and whether such is in fact the end sought to be attained.

There are other questions discussed by counsel for plaintiffs which would be entitled to our serious consideration, but a reference to the record has satisfied us that they are not presented by the pleading, and will not for that reason be noticed. The decree of the district court is reversed, and the cause remanded for further proceedings in accordance with this opinion. Reversed.

RUND v. TOWN OF FOWLER.

(41 N. E. 456, 142 Ind. 214.)

Supreme Court of Indiana. Oct. 9, 1895.

Appeal from circuit court, Benton county; U. Z. Wiley, Judge.

Action by the town of Fowler against Henry Rund. Judgment for plaintiff. Defendant appeals. Affirmed.

Fraser & Isham, for appellant. Brown & Hall, for appellee.

HACKNEY, J. This is an appeal from the judgment of the lower court assessing a penalty against the appellant for the violation of an ordinance of said town. The appellant insists that the ordinance is invalid—First, because the appellee had no power to pass it; and, second, because its provisions are arbitrary and unreasonable. The first section declares that slaughterhouses within the corporate limits of the town shall be deemed public nuisances. The second section, with the violation of which the appellant was charged, provides that “it shall be unlawful for any person or persons or corporation to maintain or operate any slaughterhouse within the corporate limits of said town.” Section 3 prescribes the penalties for violating said second section. The statute defining the powers of town corporations (section 4357, Rev. St. 1894; section 3333, Rev. St. 1881) provides that the board of trustees shall have power: “Fourth. To declare what shall constitute a nuisance, and to prevent, abate and remove the same; and to take such other measures for the preservation of the public health as they shall deem necessary. * * * Eighth. * * * To direct the location of slaughterhouses.” Upon the question of the express power of the appellee to adopt and enforce the ordinance before us, the appellant’s counsel confine their argument to the last-quoted provision of the statute, insisting that the power to direct the location does not include the power to exclude from the corporate limits or to declare the maintenance of slaughterhouses to constitute a nuisance. If this provision stood alone, we should not incline to the view that the ordinance in question exceeded the power given. Its effect is certainly to provide that slaughterhouses shall not be located within the corporate limits, and that a violation of this direction shall bring the penalty prescribed. The ordinance finds support as the exercise of a police power, and has for its object the preservation of the public health. This power is given by the provision of the statute first quoted: “To declare what

shall constitute a nuisance, and to prevent * * * the same.” The ordinance in question declares that a slaughterhouse within the corporate limits of the town shall be deemed a public nuisance, and the penalty prescribed is intended to prevent the establishment or maintenance of such nuisance. The general grant of power following that just quoted is of great scope, and manifests the intention of the legislature to intrust to the municipality large discretion in the enactment of “measures for the preservation of the public health.” It is possibly true, as counsel insist, that a slaughterhouse is not per se a nuisance, and that it is possible for the municipality to exceed its power by declaring, arbitrarily, that to be a nuisance which neither from its character, nor the manner in which it is controlled or conducted, is a nuisance. However, a slaughterhouse erected or conducted in violation of the ordinance becomes a nuisance, though it may not have been such in the absence of such ordinance. Nor can it be said that this appeal may be maintained because the ordinance, so far as it declares a slaughterhouse within the town limits to be a nuisance, is an arbitrary declaration against a business not otherwise a nuisance. The penalty from which the appeal is prosecuted is for maintaining a slaughterhouse within the town limits. As we have said, the right to direct the location of such houses is given by the letter of the legislative grant, and the penalty is assessed for the failure to obey the direction that such houses shall not be located within the corporate limits. The power given had been exercised by excluding them from a particular locality. This is but the equivalent of a direction that they shall be located without the corporate limits. Where power exists to pass and enforce an ordinance, as we hold that it does in this case, there can be no inquiry by the courts into the wisdom or reasonableness of the power, or its exercise, unless it infringe some provision of the constitution. *Steffy v. Town of Monroe City*, 135 Ind. 466, 35 N. E. 121, and authorities there cited.

The answer of the appellant that the slaughterhouse was given its location by the direction and with the consent of the town trustees is not available as an estoppel without allegations that such direction or consent was by corporate action taken in some method recognized by law, if, indeed, an order regularly entered of record by the board in session would estop the corporation to take subsequent action to the contrary. See *Barthet v. City of New Orleans*, 24 Fed. 563.

Finding no error in the record, the judgment of the circuit court is affirmed.

CITY OF AUSTIN v. AUSTIN CITY
CEMETERY ASS'N.

(28 S. W. 528, 87 Tex. 330.)

Supreme Court of Texas. Dec. 3, 1894.

Certified questions from court of civil appeals of Third supreme judicial district.

Action by the Austin City Cemetery Association against the city of Austin. On appeal by defendant to the court of civil appeals, questions were certified to the supreme court.

Geo. F. Pendexter, for appellant. C. H. Miller and Fisher & Townes, for appellee.

GAINES, C. J. The court of civil appeals for the Third supreme judicial district in the case above stated submits the following statement, and certifies for our determination the accompanying questions:

"The appellee is a corporation chartered under the laws of this state for the purpose of maintaining a cemetery in the city of Austin, and owning and selling lots therein for the purpose of the burial of dead human bodies; and that in 1892 it acquired and purchased within said city limits, on the north side of the Colorado river, a tract of land for said cemetery; and that in February, 1893, the city of Austin, as a municipal corporation, passed the following ordinance:

"Be it ordained by the city council of the city of Austin.

"Section 1. That it shall be unlawful for any person to bury, or cause to be buried, or to in any manner aid or assist in the burial of the dead body of any human being, within the corporate limits of the city of Austin, north of the Colorado river, except in the State Cemetery, the Mount Calvary Cemetery, and the cemetery heretofore established by ordinances of said city, and therein designated as the Austin City Cemetery; provided, that the two and one-half acre tract lying on the north of said last named cemetery, purchased by said city in 1890, shall not be considered as part of said cemetery, and no burials shall be made in said tract.

"Sec. 2. Any person who shall bury, or cause to be buried, or in any manner aid or assist in the burial of the dead body of a human being, in violation of section one of this ordinance, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be fined not less than fifty dollars, nor more than two hundred dollars.

"Sec. 3. This ordinance shall take effect and be in force from and after its publication, as required by the charter of the city of Austin."

"This ordinance was passed by virtue of the following provision of the city charter: 'To regulate the burial of the dead and to prohibit public funerals in cases of death from contagious or infectious disease; to pur-

chase, establish and regulate one or more cemeteries within or without the city limits.' [Sp. Laws 1891, p. 109, § 57, subsec. 6.] The territory within the city limits on the north side of the Colorado river embraces something over 4,500 acres of land, some of which is thickly settled, and some of which is very sparsely settled. There is territory embraced within the city limits, on the south side of the Colorado river, that confessedly may be suitable for a cemetery and burial purposes, and in which cemeteries are not prohibited. The appellee brought its suit by injunction to restrain the city from enforcing the ordinance set out against its cemetery and the burial of the dead there, and asks that said ordinance be declared void on the ground that the charter did not authorize the city to pass such an ordinance, and on the further ground that the same is unreasonable and unjust, and in effect deprives appellee of its property and rights without due process of law."

The questions submitted for our decision under the statement of the case are as follows: "Question No. 1: Does the fact that the ordinance set out may be void, and that the city was not immediately seeking to enforce it, and the fact that a legal remedy may exist against its enforcement, sufficient to deny the appellee the remedy by injunction to restrain its execution, and to declare the ordinance void, when the facts in the record show that the right and privilege of using its property for cemetery purposes was destroyed or impaired by virtue of the existence of the ordinance, as no one in the control of dead bodies was willing that they should be buried or interred there for fear of violating the ordinance in question? Question No. 2: Does the provision of the city charter authorize the passage by the city council of the ordinance in question? Question No. 3: If said ordinance was legally passed by virtue of authority of the charter, have the courts the authority to inquire into the reasonableness or unreasonableness of the ordinance? Question No. 4: Is the ordinance in question void on the ground that it is unjust and unreasonable, or that it deprives the appellee of its rights or property without due process of law? Question No. 5: If the ordinance may be unjust or unreasonable, has the trial court the power to so determine, as a matter of law, when there is a jury trial, or should the matter, as a mixed question of law and fact, be left to the determination of the jury?"

1. We are of the opinion that, if the ordinance in controversy be void, the appellee is entitled to restrain its enforcement by the writ of injunction. It is not to be controverted that, as a general rule, the aid of a court of equity cannot be invoked to enjoin criminal prosecutions. This rule is, however, subordinate to the general principle that equity will grant relief when there is not a plain, adequate, and complete remedy at law; and,

when it is necessary to prevent an irreparable injury, courts of criminal jurisdiction have power to enforce an observance of statutes against crime by visiting upon offenders the penalties affixed for their infraction, and ordinarily no one can call to his aid the powers of a court of equity in order to enforce their observance. Yet it has been held that "the court will interfere to prevent acts amounting to crime, if they do not stop at crime, but also go to the destruction or deterioration of the value of the property." *Spinning Co. v. Riley*. L. R. 6 Eq. 551. This, however, does not assist us materially in the solution of the present question. It would seem clear that if a party could be enjoined from doing an act, not criminal in its nature, which is injurious to the property of another, he could also be enjoined if the act be one made punishable by law as a crime. The punishment of the criminal, when the act committed has injuriously affected the value of the property of another, does not repair the injury. The question under consideration arises upon quite a different case. Here the appellee seeks to enjoin the city of Austin from enforcing an ordinance which it claims to be void, and says that, if the enforcement be not restrained, it will result in an irreparable injury. In behalf of the city it is answered that, if the ordinance be invalid, there exists a plain, adequate, and complete remedy at law. It is true that, if the ordinance be void, any one prosecuted under its provisions may have it so declared, either in the original criminal action, or by suing out a writ of habeas corpus. Notwithstanding this fact, it is clear to us, without the statement of the conclusion by the court of civil appeals, that the effect of the ordinance is such that, if its enforcement be not restrained, it may result in a total destruction of the value of appellee's property for the purpose for which it was acquired. Its provisions are very sweeping, and denounce a penalty against "any person who shall bury, or cause to be buried, or in any manner aid or assist in the burial of the dead body of a human being," contrary to its provisions. No one, we apprehend, without some considerable inducement, will do an act which may cause him to be arrested and prosecuted, however clear he might be in his own mind that the act con-

stituted no violation of the criminal law. A criminal prosecution is unpleasant to all people who have due respect for the law, and almost necessarily involves inconvenience and expense. As long as the ordinance remains undisturbed, it acts in *terrorem*, and practically accomplishes a prohibition against the burial of the dead within the limits of the city of Austin, save in the excepted localities. Under these conditions, who would venture to bury, or be concerned in burying, a dead body in appellee's ground, or who would purchase a lot in its cemetery? Suppose a city, not having the power under its charter to do so, should pass an ordinance prohibiting the sale of butchers' meat in a certain locality, and suppose it should also prohibit any one from selling meat to be there sold, or from buying in the prohibited place. The ordinance would be void; but could any one say that the business of a market man in the locality might not be effectually destroyed by it? Under such circumstances, we are of opinion that he should have the right to proceed against the corporation to enjoin its enforcement. If a penalty was denounced against no one but the market man who should sell, it would seem that his remedy would be to proceed with his business, and defeat any prosecution that should be brought against him for the infraction of the void ordinance. But to deny a remedy in a court of equity in the case first supposed, or in the present case, analogous to it, would be, we think, to disregard the fundamental principle upon which such courts are established. We are aware that our conclusion in this case is in conflict with the case of *Wardens of St. Peter's Episcopal Church v. Town of Washington*, 109 N. C. 21, 13 S. E. 700; but it is supported by the case of *City of Atlanta v. Gate City Gaslight Co.*, 71 Ga. 106, and other authorities. In the latter case the court say: "Where it is manifest * * * that a prosecution and arrest is threatened for an alleged violation of city ordinances, for the sole purpose of preventing the exercise of civil rights conferred directly by law, injunction is the proper remedy to prevent injury to the party thus menaced."¹

* * * * *

¹ Part of the opinion is omitted.

STATE v. SARRADAT et al. (No. 11,391.)
(15 South. 87, 46 La. Ann. 700.)

Supreme Court of Louisiana. April 9, 1894.

Appeal from recorder's court of New Orleans; August M. Aucoin, Judge.

John L. Sarradat and others were convicted of violation of an ordinance, and appeal. Affirmed.

Sambola & Ducros, for appellants. E. A. O'Sullivan, City Atty., and George W. Flynn, Asst. City Atty., for the State.

McFENERY, J. The defendants were convicted and fined for violating sections 22, 26, 27, of City Ordinance 4155, Council Series, amended by Ordinance 4274, Council Series. They appealed, alleging the unconstitutionality and illegality of the ordinance. In detail the defense is that the provisions of said ordinance are oppressive, and contrary to the enlightened policy of the state, and, "inasmuch as section 27 aforesaid prohibits the sale of their vegetables in any other part of the market or vicinity, and during more than half the business portion of the day,—i. e. between the hours of seven o'clock a. m. and two o'clock p. m., in violation of the first and the two hundred and sixth articles of the state constitution;" that the said sections of the ordinance are arbitrary, and in restraint of trade, and in contravention of common as well as private rights; that the provisions of section 22, if they apply to defendants' calling, exclude them from the markets, in violation of their constitutional rights to sell their produce; that the sale of the defendants' vegetables is not a nuisance, and injurious to the public health; that the police force of the city and the market lessees are convinced of the illegality of the ordinance, and have not heretofore attempted to enforce it, and permit the sale of vegetables from gardener's carts at the market on the payment of 25 cents per day. Article 206 of the constitution has no application to the case. Article 1 has reference to the origin of government from the people, and defines the legitimate objects of government, its legitimate end being "to protect the citizen in the enjoyment of life, liberty, and property." Its failure to protect the public health would be as great a violation of its "legitimate end" as to entirely depart from its object by the enactment of a law infringing upon the rights of the individual. We may assume, therefore, that the proper regulation of the market is a sanitary measure, being for the purpose of promoting the public health, and a legitimate exercise of the governmental power. In the exercise of this power the legislature has conferred ample and complete power on the city council to establish markets, and to provide for the cleanliness and salubrity of the city. In carrying out this conferred power, the city council has the power "to designate certain

spots or places for the sale of certain articles of provisions. In doing so they facilitate the people in the purchase of provisions of first necessity by confining the sale of them to particular places and hours of the day, and they facilitate the inspection of provisions; and by the hire of stalls they raise money to defray the expenses of building market houses, and pay the salaries of officers they appoint to prevent the sale of unsound provisions; and they have an undoubted right to prevent the violation of ordinances they may pass in establishing markets." *Morano v. Mayor*, 2 La. 217. The doctrine enunciated in this case seems to be universal. *Dill. Mun. Corp.* § 313; *Parker & W. Pub. Health & Safety*, par. 305; *State v. Gisch*, 31 La. Ann. 544. The right to establish public markets is accompanied by the right to prevent the establishment of private markets within prescribed limits. *Parker & W. Pub. Health & Safety*, par. 307; *State v. Gisch*, 31 La. Ann. 544; *City of New Orleans v. Stafford*, 27 La. Ann. 417; *State v. Schmidt*, 41 La. Ann. 27, 6 South. 530; *State v. Barthe*, 41 La. Ann. 46, 6 South. 531; *State v. Natal*, 42 La. Ann. 612, 7 South. 781; *State v. Deffes*, 44 La. Ann. 164, 10 South. 597. And also to prohibit the peddling about the streets of the city of all perishable food articles. The city council therefore has the unquestioned authority to designate a place where perishable articles of food, such as meat, fish, fruits, and vegetables, may be sold; the market limits; to regulate the police management of the market places; to lease the same, not for the purpose of revenue alone, but in order to maintain the proper police of the markets; the building of market houses, and the repairs of the same; and for this purpose to authorize the lessee to charge a reasonable sum for stall and market room. *Morano v. Mayor*, 2 La. 217. The establishment of market places is for public convenience, as well as for the promotion of the cleanliness and health of the city. It is not a permit or license to sell particular articles there, and therefore no special license for selling at that particular place can be exacted. But this does not prohibit the payment for the use of stalls and market room or space, which is exacted for the purpose of keeping up the market places. The market places having for their double purpose the preservation of the public health and the general convenience of the public, all persons who resort to them for the sale of such articles as are required to be sold there must have access to them. The market regulations must be impartial, affording the same rights to all, avoiding the creation of monopolies in one or several persons, and the prohibition of trade in any article, or an undue restraint of trade. *Parker & W. Pub. Health & Safety*, par. 308; *Dill. Mun. Corp.* § 380; *City of Jacksonville v. Ledwith*, 26 Fla. 163, 7 South. 885; *State v. Mahner*, 43 La. Ann. 497, 9

South. 480. Section 22 of the ordinance prohibits the peddling of meats, fish, game, fowls, vegetables, and fruits in any of the public markets, or within six blocks of same. Section 26 gives the right to market wagons to back up to the banquettes along the markets, to deliver goods previously sold to occupants of stalls. It prohibits the owners of the wagons from selling their produce from said wagons between the hours of 7 a. m. and 2 p. m. No fees or dues are to be collected from said wagons. Section 27 prohibits the sale of any article on the sidewalk or the public walks in front or in the rear or around any of the markets. The offense of defendants was selling from their wagons while they were backed to the market banquette for the purpose of delivering goods sold to owners of stalls.

Under the terms of the law referred to above, we are unable to see where any of the rights of defendants were infringed. They were dealers in vegetables, which the ordinance required should be sold, if within market limits, within market hours. They were not excluded from the sale of their produce in the markets. They could have rented stalls or space, and disposed of their goods within the market inclosure. There was no monopoly created in favor of one or more persons by the prohibition of the sale of certain articles immediately on the banquettes and approaches to the markets. This regu-

lation did not prevent their sale elsewhere, either in the market or beyond the market limits. The market ordinance is not oppressive, as it interferes with no right of the defendants. It is not partial, and does not operate against them exclusively, but is applicable to the vendors of articles or goods required to be sold within certain limits and within certain hours. The conflict about the deficiency of room for the numerous carts or wagons at the market has nothing to do with the case. There is no prosecution for obstructing the approaches to the market by defendants' carts.

The testimony which was rejected also has no place in determining the question at issue. It is immaterial whether the defendants for a long time were permitted by the market lessees and the police to sell from their wagons while backed to the market sidewalks, or that they were required to pay 25 cents for selling from their wagons. The ordinance does not require the payment of such a fee, and the evidence was irrelevant.

Because the defendants raised the produce which they sold, in violation of the ordinance, gave them no special privilege of exemption from its operation. The case of *State v. Blaser*, 36 La. Ann. 363, relied upon by defendants, presents a different state of facts, and different issues were involved, and therefore is inapplicable here. Judgment affirmed.

PEOPLE v. WAGNER et al. SAME v. BARRIE et al. SAME v. WITTELSBERGER et al.

(49 N. W. 609, 86 Mich. 594.)

Supreme Court of Michigan. July 28, 1891.

Certiorari to recorder's court of Detroit.

The defendants in each case were jointly convicted of a violation of an ordinance, and the three cases came to the supreme court on a writ of certiorari by stipulation, on one record. Writ dismissed.

William Look and H. F. Chipman, for petitioners. Chas. W. Casgrain, City Atty., for the People.

McGRATH, J. This case comes from the recorder's court of the city of Detroit by writ of certiorari, defendants having been convicted of a violation of a city ordinance. By stipulation, the cases come up on one record. Defendants are bakers, and are charged with making for sale, selling, and offering for sale, bread that was deficient in weight under the ordinance. The ordinance is entitled "An ordinance relative to the manufacture and selling of bread." The ordinance provides that it shall not be lawful for any person to carry on the trade or business of baker, without first having obtained from the common council a permit for that purpose. It next prescribes how the permit shall be obtained, and that the clerk shall keep a record of the permits granted. It then concludes as follows: "Sec. 4. All bread of every description, manufactured by the bakers of this city for sale, shall be made of good and wholesome flour or meal, into loaves of one pound, two pounds, and four pounds (and no other) avoirdupois weight; and no baker shall make for sale, or shall sell or expose for sale, any bread that shall be deficient in weight, according to the requisitions prescribed in the preceding section of this chapter: provided, always, that such deficiency in the weight of such bread shall be ascertained by the sealer of weights and measures, by weighing, or causing to be weighed, in his presence, within eight hours after the same shall have been baked, sold, or exposed for sale: and provided, further, that whenever any allowance in the weight shall be claimed on account of any bread having been baked, sold, or exposed for sale more than eight hours, as aforesaid, the burden of proof in respect to the time when the same shall have been baked, sold, or exposed for sale shall devolve upon the defendant or baker of such bread. Sec. 5. The sealer of weights and measures, under the direction of the chief of police, shall be inspector of bread; and it shall be his duty, and he is hereby authorized and required, from time to time, and not less than once in each month, at all reasonable hours, to enter into and inspect and examine every baker's shop, storehouse, or other building where any bread is or shall be baked, stored,

or deposited, or offered for sale, and to inspect and examine, in any part of said city, any person or persons, wagons or other carriages, carrying any loaf of bread for the purpose of sale, and weighing the same, and determine whether the same are in violation of the true intent and meaning of this chapter; and, if the said inspector shall find any bread not conformable to the directions herein contained, or any part of them, he shall make complaint thereof for the purpose of having such person prosecuted according to law. Sec. 6. No person or persons shall obstruct, or in any manner impede or willfully delay, the said sealer of weights and measures in the execution of his duties under this act, either by refusing him or delaying his entrance or admission into any of the places above named, or refuse or omit to stop their wagon or carriage as aforesaid, whereby the due execution of this ordinance, or any part of it, shall be impeded or obstructed. Sec. 7. Any violation of any of the provisions of this ordinance shall be punished by a fine not to exceed fifty dollars and the cost of prosecution; and the offender may be imprisoned in the Detroit house of correction until the payment thereof: provided, always, that the term of imprisonment shall not exceed the period of six months." The defendants insist (1) that matters contained within the body of the ordinance are not within its title; (2) that by the ordinance private property is taken without compensation; (3) that the ordinance abridges the right of the respondents to manufacture loaves of bread of such size or weight as they may deem most salable; (4) that it curtails defendants' business, and places a limitation upon the capacity of respondents to carry on a lawful business; (5) that the ordinance is not within the police powers of the state.

There is no force in the first objection, as the provisions of the ordinance are clearly within the scope of its title. It has been held that the constitutional provisions relating to the title of laws passed by the legislature do not apply to ordinances enacted by a common council of a city. *People v. Hanrahan*, 75 Mich. 611-615, 42 N. W. 1124.

The ordinance does not provide for the taking, seizing, or destruction of short-weight bread. It does prohibit the sale of bread which is deficient in weight. The same objection might be made to ordinances prohibiting the importation of infected rags, or the sale of diseased cattle or of unsound beef, or of decayed vegetables, or of illuminating oils which are below the standard test, or of watered milk. In *Wheeler v. Russell*, 17 Mass. 257, it was held that no recovery could be had for the price and value of shingles which were not of the statutory dimensions. In *Eaton v. Keegan*, 114 Mass. 433, it was held that, in view of the statute requiring oats and meal to be sold by the bushel, no recovery could be had for the price and value of those articles when sold by the bag.

It is claimed by defendants that, in order to

get a pound of baked bread, they are compelled to put into the oven more than a pound of dough, and that the process of baking reduces the weight, and, when asked what it is that evaporates, they reply, "Water." But they say the process of baking is not always uniform. The oven may be too hot. In such case, the bread crusts or skins quickly, retaining the moisture. And again, it may be too cold; in which case the bread dries up, rather than bakes, and, in order to insure a pound loaf, the latter contingency must be provided against, and the weight of the dough must always be regulated accordingly. That fermentation is not always regular, and, when it reaches a certain point, the dough must be put into the oven, without reference to the condition of the oven. That the cutting up of the dough, the weighing of it, and its transfer to the oven is necessarily hurried, and the scales are liable to become clogged or affected by dust. Notwithstanding all the difficulties suggested by respondents, the evidence shows that the bread inspector has been diligent in the performance of his duties; had frequently visited the several bakeries of defendants, and but one of these defendants has before this time been complained of, and that was 15 years ago; and it is admitted by defendants, not only that the ordinance may be complied with, but that the short-weight bread discovered by the inspector was made for the very purpose of testing the validity of this ordinance; and, after the authorities had caused complaint to be made against defendants, they resumed the former manner of doing business, and made their bread in accordance with the provisions of the ordinance. Again, it is claimed that a barrel of flour will make 250 loaves of bread, and that it is impossible to distribute an ordinary advance in price of flour over this product; in other words, that the price of a loaf of bread cannot be advanced a fraction of a cent. This difficulty affects the retail dealer more than the wholesaler. It has to be met in the sale of a pound of nails, of a dozen buttons, or of a paper of needles, as well as in the sale of a loaf of bread. The ordinance does not attempt to regulate the price of the commodity. That is not necessarily fixed with reference to flour at its cheapest price, so that, until the price of flour is reduced until it reaches a point where the reduction may be distributed, the dealer gets the advantage of the reduction, and when it advances above the standard the consumer gets the advantage, until a point is reached where the advance may

be added. This fluctuation and these results are ordinary incidents of trade. The state may institute any reasonable preventive remedy when the frequency of the frauds, or the difficulty experienced by individuals in circumventing them, is so great that no other means will prove efficacious. Tied. Lim. p. 208, § 89. Bread is an article of general consumption. It is usually sold by the loaf, and the individual consumer, in the majority of cases, buys by the single loaf. Each transaction involves but a few pennies, although the number of individual transactions in a large city reaches each day into the thousands, and the opportunities for fraud are frequent. It would be practically impossible to prevent fraud in the sale of short-weight loaves, if the matter was left to the ordinary legal remedy afforded the individual consumer for fraud or deceit. The amount involved would not justify a resort to litigation. Sales are invariably made in loaves of the size of one, two, or four pound packages, and the ordinance simply takes the usual and ordinary packages or loaves into which bread is made, and fixes the standard of weight of each package. It does not prohibit the sale of bread by weight if it overruns, as it is claimed that it sometimes does, nor does it prohibit the exaction of an increased price by reason of the additional weight. It does not prohibit the sale of a half or a quarter or any other fraction of a loaf. Our statutes not only fix the number of pounds of each of the various commodities that shall constitute a bushel, but they also provide that a "box" or "basket" of peaches shall contain one-third of a bushel, and they fix the size of a "barrel" of fruit, roots, or vegetables, and they may, with equal propriety, fix the weight of a package or loaf of bread.

The police power of a state is not confined to regulations looking to the preservation of life, health, good order, and decency. Laws providing for the detection and prevention of imposition and fraud, as a general proposition, are free from constitutional objection. Tied. Lim. p. 208, § 89. The charter of the city of Detroit empowers the common council "to direct and regulate the weight and quantity of bread, the size of the loaf, and the inspecting thereof." The ordinance is clearly within this provision, and it cannot, under the decision in *People v. Armstrong*, 73 Mich. 293, 41 N. W. 275, be subjected to the test of reasonableness. The convictions are affirmed, and the writ dismissed. The other justices concurred.

WALKER et al. v. JAMESON et al.
(37 N. E. 402, 140 Ind. 591.)

Supreme Court of Indiana. May 9, 1894.

Appeal from circuit court, Marion county;
E. A. Brown, Judge.

Action by Thomas J. Jameson and others to enjoin Greenberry Walker and others from interfering with or removing certain garbage which plaintiffs had contracted to remove. From a judgment for plaintiffs, defendants appeal. Affirmed.

John F. Carson, C. W. Thompson, and McCullough & Spaan, for appellants. Miller, Winter & Elam, for appellees.

DAILEY, J. On July 12, 1893, the city of Indianapolis, by its board of public works, by contract (a copy of which is in the complaint) clothed James H. Woodward with the exclusive right and obligation to remove the garbage from the premises of all persons in said city, and to transport the same through the streets thereof to the crematory. On August 18, 1893, with the written consent of the city, said Woodward assigned the contract to the appellee Jameson. The circuit court, at the suit of Jameson, after due notice and hearing on complaint and affidavits, enjoined appellants from interfering with or removing such garbage. By this appeal, appellants attack the ruling of the circuit court granting that injunction.

The general ordinance of the city (No. 5, 1893) designed to effectuate the contract is set out in the complaint. The contract makes it the duty of the contractor to remove all the garbage. The ordinance requires the householder to place the garbage in proper receptacles convenient for removal, and forbids any person other than the contractor to interfere with or remove the same. The ordinance is expressly authorized by section 23 of the charter (Acts 1891, pp. 143-145), wherein it is provided that the common council shall have the power to enact ordinances "to prevent the deposit of any unwholesome substances, either on private or public property, compel its removal to designated points, and to require slops, garbage, ashes, waste or other material to be removed to designated points, or to require the occupants of premises to place them conveniently for removal." In strict pursuance of this expressly authorized power, the ordinance in question was passed. Section 59 of the city charter (Acts 1891, pp. 167-169, et seq.) expressly authorizes the board of public works "to remove all dead animals, garbage, filth, ashes, dirt, rubbish or other offal from such city, either by contract or otherwise." Accordingly, the common council having authority to pass the ordinance providing for the collection and storage, in proper receptacles, of the garbage, and the board of public works having authority to remove the same, the ordinance was passed, and the contract was made, each

supplementing the other, to carry out the common duty imposed on the two bodies for the protection of the public health, in the prompt and efficient removal of all garbage in an inoffensive manner. The contract was let to the lowest bidder, as section 61 of the charter provides. It fixes the price for removal by the contractor at .249—practically one-fourth—of a cent per pound, this being the maximum; permits the contractor to collect the same from the householder, the party producing the garbage; and expressly exempts the city from any liability in the premises. Appellants contend that this contract is invalid for several reasons: First, the contention is that the contract is invalid because the board of public works had no authority to make it. The first reason given in support of this claim is that the provision for payment by the householder for the removal of his garbage is an "assessment" against him or his property, and, as the charter does not confer the power to make an assessment of this kind, therefore it cannot be made. If the premises were correct, the conclusion would necessarily follow. The infirmity is in the assumption that this contract provides for an assessment, either upon person or property. An assessment is a charge laid upon individual property because the property upon which the burden is imposed receives a special benefit which is different from the general one which the owner enjoys in common with others as a citizen. Elliott, Roads & S. 370. When the legislature so declares, a lien in the amount fixed fastens upon the property as against the owner and all who acquire rights subsequent to the time it attaches. Id. 432. An assessment is levied only upon the property benefited. It has been uniformly restricted to the means for paying those local burdens arising by reason of the wants of small communities. The general meaning of the word "assessment" is authoritative imposition. Welty, Assessm. pp. 2, 3. In this case there is nothing of the kind. No householder is required to have garbage removed or pay for its removal. Every householder may destroy all his garbage on his own premises, taking care not to create a nuisance in so doing. If he do not destroy all, he may reduce it to a minimum. This ordinance and contract simply provides that, if he does produce garbage which has to be carted through the streets, the city or its agent, the contractor, shall do the work at his expense. Whatever else it may be, it is certainly not an assessment. It has not a single element of an assessment, for the reasons—First, that, except by the voluntary act of the householder, nothing is to be paid at all; second, no definite amount in any event is to be paid; third, nothing is made a charge upon the property. The whole arrangement is simply a provision by the ordinance—First, that garbage shall be collected and carted through the streets only by the licensed agent

of the city; second, that parties producing the garbage needing to be thus carted away shall place the same in proper vessels, convenient for the removal by such agent; and, third, that such agent shall charge not exceeding the price named for removing the same. It is no more an assessment than is the provision of the ordinance fixing the rate of payment for gas or water, or street-car fare, as authorized by section 59 of the city charter, or the numerous provisions of section 23, specifying that the common council may require things done by the parties, and, if not so done, have the city do them at their expense, as taking down dangerous buildings, removing snow from the walks, etc. It cannot be said that the charter does not expressly authorize the fixing of prices for removal of garbage, because the same section which confers upon the board the power "to remove all dead animals, garbage, filth, ashes, dirt, rubbish or other offal from such city, either by contract or otherwise," impliedly authorizes the fixing of a price therefor. That is the very essence of the power to contract. The appellants' learned counsel say: "But the charter never gave the board of public works power to contract for removal of garbage on behalf of any one, except on behalf of the municipal corporation. Had it undertaken to confer upon them the power to fix prices which should be paid by citizens for its removal, then it would have said so in express terms, just as it did with reference to water, gas, etc. The fact that it did not do so is evidence * * * that it contemplated or conferred no such power." It is within the general power of a government to preserve and promote the public welfare, even at the expense of private rights. 18 Am. & Eng. Enc. Law, 739, 740. Police power is defined in *Gaslight Co. v. Hart*, 40 La. Ann. 474, 4 South. 215, where it is said: "It is the right of the state functionaries to prescribe regulations for the good order, peace, protection, comfort, and convenience of the community, which do not encroach on the like power vested in congress by the federal constitution." In *Com. v. Alger*, 7 Cush. 53, the court lays down the rule that "rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient." In *Thorpe v. Railroad Co.*, 27 Vt. 149, it is said: "By this general police power of the state, persons and property are subjected to all kinds of restraints and diligence in order to secure general comfort, health, and prosperity of the state." In *Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 192, the court say: "The police power of the state is coextensive with self-protection,

and is applicably termed the 'law of overruling necessity.' It is the inherent and plenary power in the state which enables it 'to prohibit all things hurtful to the comfort and welfare of society.'" *Hale v. Lawrence*, 21 N. J. Law, 714; *Tied. Lim. § 1*. It is said in 18 Am. & Eng. Enc. Law, 744, 745, that a law which might be invalid as an exercise of the right to tax for revenue might be sustainable where its purpose was the promotion of the general public health or morals. In exercising the power of taxation, no discriminations are to be made, while in the exercise of police power, the state is ordinarily to be governed only by considerations of what is for the public welfare. It rests solely within legislative discretion, inside the limits fixed by the constitution, to determine when public safety or welfare requires its exercise. This must be determined by recognized principles. "Courts are authorized to interfere and declare a statute unconstitutional only when it conflicts with the constitution. With the wisdom, policy, or necessity of such an enactment they have nothing to do." *Id.* 746.

It resolves itself solely into a question of power, and not of mere reasonableness. We recognize the rule that a municipal corporation has no power to treat a thing as a nuisance which cannot be one; but it is equally well settled that it has the power to treat as a nuisance a thing that, from its character, location, and surroundings, may or does become such. In doubtful cases, where a thing may or may not be a nuisance, depending upon a variety of circumstances requiring judgment and discretion on the part of the town authorities in exercising their legislative functions, under a general delegation of power like the one we are considering, their action, under such circumstances, would be conclusive of the question. *Baumgartner v. Hasty*, 100 Ind. 577-578. In 15 Am. & Eng. Enc. Law, 1173, it is said: "Municipal corporations are usually given authority to pass ordinances providing for the preservation of public health. This is one of the police powers of the state, and there can be no doubt that the sovereignty has the right to delegate this power to municipal authorities." In *Beach on Public Corporations* (volume 2, § 995) it is said: "A by-law of a city prohibiting any person not duly licensed by its authorities from removing the house dirt and offal from the city is not in restraint of trade, but reasonable and valid, on the ground that, in the interest of public health, a city is justified in providing for some general system for removing offensive substances from the streets by persons engaged by the city, and responsible for the work, at such times as they are directed to attend to it." So, *Dillon on Municipal Corporations* (section 369) is as follows: "Our municipal corporations are usually invested with power to preserve the health and safety of the inhabitants. This is, indeed,

one of the purposes of local government, and reasonable by-laws in relation thereto have always been sustained in England as within the incidental authority of corporations to ordain. It will be useful to illustrate the subject by reference to some of the adjudged cases. An ordinance of a city prohibiting, under a penalty, any person not duly licensed therefor by the city authorities, from removing or carrying through any of the streets of the city any house dirt, refuse, offal, or filth, is not improperly in restraint of trade, and is reasonable and valid. Such a by-law is not in the nature of a monopoly, but is founded on a wise regard for the public health. It was conceded that the city could regulate the number and kind of horses and carts to be employed by strangers or unlicensed persons, but practically it was considered that the main object of the city could be better accomplished by employing men over whom they have entire control, night and day, who are at hand, and able, from habit, to do the work in the best way and at the proper time." It has often been held to be reasonable to grant to one or more the exclusive right to remove the carcasses of dead animals and other offal of a city. In *re Vandine*, 6 Pick. 187; *Cooley*, Const. Lim. (6th Ed.) p. 739; *Tied*, Lim. p. 316; *Dill*, Mun. Corp. §§ 141, 142. In the case of *Boehm v. Mayor*, etc. (1883) 61 Md. 259, it was held that the city, under the power to preserve the health and safety of its inhabitants, had the undoubted right to pass ordinances creating boards of health, appointing health commissioners with other subordinate officers, regulating the removal of house dirt, night soil, refuse, offal, and filth by persons licensed to perform such work, and providing for the prohibition, abatement, and suppression of whatever was intrinsically and inevitably a nuisance. The case of *In re Vandine*, 6 Pick. 187, is in point here. It directly adjudges that a by-law of the city of Boston prohibiting any one not licensed by the city from removing house dirt and offal from the city is valid. On the trial the court instructed the jury that the subject of regulation was one on which it was proper for the city to legislate, it having reference to the public convenience and the health of the inhabitants; * * * that it was the duty of the city to remove from the streets and houses all nuisances which might generate disease or be prejudicial to the comfort of the inhabitants, and it was both reasonable and proper that it should be in their discretion to contract with persons to perform the work, so that it might be done on a general system. If it were found, on experiment, that the duty would not be thoroughly and faithfully performed, or would be attended with more expense to the city, if individuals should remove these substances in their own carts and upon their own account, it was competent for the city government to enact a by-law which should subject all such

persons to the vigilance of that government, and which should require them to be first licensed. The jury were further instructed that so far as, by virtue of the general laws of the commonwealth, the city council had power to make by-laws for governing the city, these regulations were binding on all persons actually resident within its limits, either for business or pleasure, and whether inhabitants or strangers; that the object of the by-law being to secure to the city the regular and effectual removal, by public authority, of all sources of nuisance which are collected and accumulated in the houses in the city, by not suffering individuals under no obligation of trust to interfere in the same, it amounted to the prohibition of a nuisance, and that, so far as it affected trade, it was not a restraint, but only a regulation, of it. The defendant excepted to these instructions, and, on appeal, urged chiefly that the by-law was void, being in restraint of trade; also, that it created a monopoly, and that the city had no right to say it should be removed only by a person having a license. In ruling upon this question, the court upheld the instructions of the trial court, and said: "The great object of the city is to preserve the health of the inhabitants. To attain that, they wisely disregard any expenses which are deemed to be requisite. They might probably have these offensive substances carried out of the city without any expense, if they would permit the people from the country to take them away at such times, and in such manner, as would best accommodate them. Every one will see that, if this business were thus managed, there would be continual moving nuisances at all times, and in all the streets of the city, breaking up the streets by their weight, and poisoning the air with their effluvia. * * * It seems to us * * * that the city authority has judged well in this matter. They prefer to employ men over whom they have entire control by night and by day, whose services may be always had, and who will be able, from habit, to do this work in the best possible way and time. Practically, we think the main object of the city government will be better accomplished by the arrangement they have adopted, than by relying upon the labor of others, against whom the government would have no other remedy than by a suit for a breach of contract. The sources of contagion and disease will be speedily removed in small loads, which will not injure the pavements nor annoy the inhabitants. We are satisfied that the law is reasonable, and not only within the power of the government to prescribe, but well adapted to preserve the health of the city."

In view of the great weight of authorities, we are of the opinion that the contract and ordinance assailed are both within the long-settled and clearly-recognized lines of police power, which is as broad as the power of taxation, and, being simply a sanitary regu-

lation, they cannot be considered as in the nature of confiscation or an attempt to create a monopoly. The provision for the removal of the garbage at the expense of the property holder is an extreme exercise of this power, but is an incident of its existence. It is a familiar rule that if the power is conferred upon a municipal corporation by the laws of the state, and the law is silent as to the mode of doing such act, the corporate authorities are necessarily clothed with a reasonable discretion to determine the manner in which such act shall be done; all the reasonable methods of executing such power are inferred. *Louisville Nat. Gas Co. v. State* (decided Sept. 19, 1893) 34 N. E. 702; *Thornt. Mun. Law*, § 3106, note 3, and cases cited. The right of removal, by contract or otherwise, being vested in the city, it was for the common council to determine whether the work should be paid for out of the city treasury, or by the person producing the garbage, and their action is not subject to review here. It may be that the hotel and restaurant keepers will lose money on their garbage under the workings of this contract, where they before derived a revenue; but if, under this plan, the sources of contagion and disease will be more speedily and effectively

removed, the city was empowered to make this contract. It may be that the common council thought it unjust that the householders who produced a small amount of garbage should be taxed to assist in removing the large accumulations of hotels and restaurants, but we have nothing to do with the motives that prompted the act in question. We find no error in the record. The judgment is affirmed.

McCABE, J. (dissenting). I cannot concur in all the reasoning in the foregoing opinion, though I do not dissent from the general conclusion reached. I am unable to concur in so much of the opinion as holds that persons whose business creates the large quantities of slops and offal, and which is of large value, are liable to have the same taken from them and destroyed without compensation. I do not think it within the power of the legislature or the city to confiscate the private property of the citizen, and destroy it, except upon necessity. I do not think there is any necessity to do so with such large quantities of offal and slops until its owners have refused to comply with reasonable regulations for the removal thereof by such owners.

Ex parte LACEY. (Cr. 33.)

(41 Pac. 411, 108 Cal. 326.)

Supreme Court of California. Aug. 1, 1895.

In bank.

Petition of James Lacey for writ of habeas corpus. Denied.

D. P. Hatch and R. B. Treat, for petitioner.
C. McFarland, for respondent.

GAROUTTE, J. The petitioner has been convicted and imprisoned for violating a city ordinance of the city of Los Angeles which provides: "No person or persons shall establish or conduct any steam shoddy machine, or steam carpet-beating machine, within one hundred feet of any church, schoolhouse, residence or dwelling-house." He now alleges the judgment void, upon the ground that the ordinance is void, and seeks his release by writ of habeas corpus. He claims the ordinance void upon the ground that it interferes with certain of his inalienable rights vouchsafed to him by the constitution. Upon the part of the city, it is claimed that the passage and enforcement of the ordinance is but the exercise of a police power granted to it in terms by the constitution of the state. The constitution of the state of California (article 11, § 11) provides: "Any county, city, town or township may make and enforce, within its limits, all such local, police, sanitary and other regulations as are not in conflict with general laws." It will thus be observed that Los Angeles city is vested with certain powers by direct grant from the constitution, and that grant of power is not confined within narrow limits, but is broad and far-reaching in its scope and effect. Under this grant of power the city had the right to pass this ordinance, unless it is in conflict with general laws; and we know of no general laws which conflict with it, unless it can be said to be violative of those general principles of constitutional liberty which form the very foundation of both the state and federal constitutions. We see nothing in the language of this ordinance contrary to these great principles of our government. We see nothing there depriving petitioner of any fundamental right. In the exercise of its police and sanitary power, the city has attempted to regulate the business of beating carpets by steam power. Under its constitutional grant, it had the right to regulate this business. The use of steam power, of itself, within municipal territory, has always been recognized as a proper subject of regulation; and, in addition, here it may well be assumed that the dust and other disagreeable and unhealthy matters arising in such quantities from the beating of carpets, as would naturally be indicated by the use of steam power, are a constant source of danger and menace to the good health and general welfare of the neighborhood where located.

Conceding the business covered by the provisions of this ordinance not to constitute a

nuisance per se, and to stand upon different grounds from powder factories, street obstructions, and the like, still the case is made no better for petitioner. This is not a question of nuisance per se, and the power to regulate is in no way dependent upon such conditions. Indeed, as to nuisances per se, the general laws of the state are ample to deal with them. But the business here involved may properly be classed with livery stables, laundries, soap and glue factories, etc.,—a class of business undertakings, in the conduct of which, police and sanitary regulations are made to a greater or less degree by every city in the country. And in this class of cases it is no defense to the validity of regulation ordinances to say, "I am committing no nuisance, and I insist upon being heard before a court or jury upon that question of fact." In this class of cases a defendant has no such right. To the extent that it was material in creating a valid ordinance, we must assume that such question was decided by the municipal authorities, and decided against petitioner and all others similarly situated. This court said in *Ex parte Shrader*, 33 Cal. 284: "The legislature can add to the mala in se of the common law the mala prohibita, of its own behest. * * * The power to regulate or prohibit, conferred upon the board of supervisors, not only includes nuisances, but extends to everything expedient for the preservation of the public health and the prevention of contagious diseases. Now, there are many things not coming up to the full measure of a common-law or statute nuisance that might, both in the light of scientific tests and of general experience, pave the way for the introduction of contagion, and its uncontrollable spread thereafter. Slaughterhouses, as ordinarily, and perhaps invariably, conducted in this country, might, within the limits of reasonable probability, be attended with these consequences. A competent legislative body has passed upon the question of fact involved, and we cannot go behind the finding. So far as we can know by this record, the power conferred has been exercised intelligently, and in good faith." It must be borne in mind that the court was not discussing this question from the standpoint that the conduct of a slaughterhouse within municipal territory constituted a nuisance per se. In the case of *Johnson v. Simenton*, 43 Cal. 249, which involved the constitutionality of an ordinance of the board of supervisors of San Francisco prohibiting the feeding of still slops to milch cows, the court says: "If, indeed, it be a fact that the milk of cows fed in whole or in part upon still slop is unwholesome as human food, there can be no doubt of either the authority or the duty of the board to enact the ordinance in question, and the scientific correctness of the determination by the board of the matter of fact involved is not open to inquiry here." In the case of *In re Jacobs*, 98 N. Y. 98, the court

declares the following rule for testing the validity of ordinances enacted under the police power of a municipality: "When a health law is challenged in the courts as unconstitutional on the ground that it arbitrarily interferes with personal liberty and private property, without due process of law, the courts must be able to see that it has at least, in fact, some relation to the public health; that the public health is the end naturally aimed at; and that it is appropriate and adapted to that end." Tried by this rule, the ordinance in question fairly and fully fills the requirements of the law. It cannot be urged that petitioner is deprived of his property without due process of law, for, as is said by Judge Dillion in his work upon Municipal Corporations (section 141), in speaking of police and sanitary regulations: "It is well settled that laws and regulations of this character, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffers injury, it is either *damnum absque injuria*, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure." This ordinance is not unreason-

able nor arbitrary nor discriminating. It treats all persons alike who are engaged in the business named therein. All have the same rights, and all are subject to the same burdens. It is not unreasonable in the limits of distance fixed. As to the location of the exact spot distant from a church or a schoolhouse or a dwellinghouse, where an ordinance would cease to be reasonable, it is not for this court now to say. The limits here prescribed are those with which we are to deal, and those limitations of distance may well be said to be reasonable. We see no substantial objection that can be made to the validity of this ordinance. Upon the contrary, the subject-matter covered by it is clearly one with which the city had the constitutional right to deal, and the businesses there enumerated are unmistakably those which the municipal authorities had the right to regulate, in the interest of the comfort and good health of the people of the city. The power is vested in the city, by direct grant from the constitution, to control and regulate business undertakings of the character here involved, and petitioner's constitutional rights have in no way been trespassed upon. It is therefore ordered that petitioner be remanded.

We concur: McFARLAND, J.; HARRISON, J.; VAN FLEET, J.; TEMPLE, J.

STATE v. JOHNSON.

(19 S. E. 599, 114 N. C. 846.)

Supreme Court of North Carolina. April 24,
1894.

Appeal from superior court, Forsyth county; Boykin, Judge.

F. R. Johnson, convicted of violating a fire ordinance of the city of Winston. Appeals. Affirmed.

Watson & Buxton, for appellant. The Attorney General and Glenn & Manly, for the State.

EVERY, J. Municipal corporations are the creatures of the legislature, and their powers may be curtailed, enlarged, or withdrawn at the will of the creator, whose control over them is limited only by the restriction that no statute will be enforced which impairs the obligation of a contract, interferes with vested rights, or is in conflict with any provision of the organic law of the state or nation. It is too well settled to recapitulate, or even justify discussion, that towns,—certainly, by virtue of an express grant of authority to do so, and, according to most authorities, by implication arising out of the general welfare clause,—if there is no general law to the contrary, are empowered to prescribe a fire limit, and forbid the erection of wooden buildings within such bounds as they may, by ordinance, prescribe. 15 Am. & Eng. Enc. Law, 1170; 1 Dill. Mun. Corp. § 405; Horr & B. Mun. Ord. § 232; Klingler v. Bickel, 117 Pa. St. 326, 11 Atl. 555. The weight of authority seems to be also in favor of the proposition that the legislature has the power to prevent the erection of wooden buildings in such corporations, or to delegate to the municipalities the authority to do so, even where the enforcement of the law or ordinance causes a suspension of work in the erection of structures of this kind by persons who are carrying out contracts for their erection made previously with the owners of the land. Cordes v. Miller, 39 Mich. 581; Ex parte Fiske, 72 Cal. 125, 13 Pac. 310. Persons, in contemplation of law, contract with reference to the existence and possible exercise of this authority, when it is vested in the municipality. City of Salem v. Maynes, 123 Mass. 374; Munn v. Illinois, 94 U. S. 113; Woodlawn Cemetery v. Everett, 118 Mass. 354; Com. v. Intoxicating Liquors,

115 Mass. 153; Knoxville Corp. v. Bird, 47 Am. Rep. 326. Upon this same principle, all agreements for building are deemed to be entered into in view of the contingency that such power may be granted by the legislature, when it has not already been delegated, while the contract is still in fieri. 15 Am. & Eng. Enc. Law, 1171. While it might be unreasonable to prohibit even the slightest repairs to wooden buildings standing within the fire limits prior to the passage of a statute or ordinance establishing such limits, the power to prevent repairs is delegated, and presumably exercised, for the protection of property; and, where a wooden structure within the bounds is partially destroyed by a fire already, it is not unreasonable to require a new roof to be made of material less liable to combustion, or to forbid the repairs altogether when the damage to the building is serious, and to that end to compel the owners to give notice to the town authorities of their purpose to repair, and of the character of the contemplated work. Village of Louisville v. Webster, 108 Ill. 414. We are aware that there is much conflict of authority as to the reasonableness of ordinances forbidding all repairs, or the enforcement of them so as to prevent replacing roofs with the same material used before their destruction. Horr & B. Mun. Ord. p. 214, § 233; Brady v. Insurance Co., 11 Mich. 425; Ex parte Fiske, supra. But in this particular instance the legislature has granted a municipality the power to supervise, or prevent the replacing of the roof with another of shingles, instead of constructing one of material less liable to destruction; and we are not prepared to question its authority to do so, since, upon the principle already announced, persons contracting with reference to the chances of the granting as well as the exercise of such powers acquire no vested rights, and afterwards voluntarily incurring all of the risks incident to their situation, have no reason to complain of the loss when it befalls them. The court imposed a fine of \$50. There was no attempt to enforce the portion of the ordinance imposing a penalty of \$10 for every hour the building was permitted to remain. There may be more doubt as to the reasonableness of that provision. Com. v. Wilkins, 121 Mass. 356. But it is not necessary to pass upon a question not fairly raised, and we forbear to do so. The judgment is affirmed.

KAUFMAN v. STEIN.

(37 N. E. 333, 138 Ind. 49.)

Supreme Court of Indiana. May 8, 1894.

Appeal from circuit court, Vigo county; C. F. McNutt, Judge.

Action by Peter J. Kaufman against Nicholas Stein for an injunction. From a judgment for defendant, plaintiff appealed. Reversed.

T. W. Harper and A. B. Felsenthal, for appellant. Jump, Lamb & Davis, for appellee.

DAILEY, J. This was an action for an injunction commenced by the appellant against the appellee. The appellee entered an appearance to the action, and filed a demurrer to the complaint, for the reason that the complaint "does not state facts to constitute a cause of action against the defendant." The material allegations contained in the complaint are as follows: (1) That plaintiff (appellant) is the owner of lot 31 in Rose's addition to the city of Terre Haute; (2) that there are upon said lot a dwelling house and other buildings; (3) that defendant owns an adjoining lot to plaintiff's said premises; (4) that upon defendant's lot there is a large frame building; (5) that both plaintiff's and defendant's lots are within the fire limits of the city of Terre Haute; (6) that the common council of the city of Terre Haute had lawfully adopted an ordinance establishing "fire limits," a copy of which is filed with the complaint and marked "Exhibit A," and which ordinance was in full force at the time of the commencement of this suit; (7) the ordinance provides that no wooden buildings shall be erected within said limits; that if such building has been heretofore erected within said limits, and it shall be removed, it shall not be relocated within the fire limits; (8) that defendant is about to remove the said frame building now on his lot, and relocate the same within said limits, 20 feet nearer plaintiff's house, and within 4 feet of plaintiff's property, and 10 feet from plaintiff's frame dwelling house, thereby increasing the danger from fire, and making the danger imminent, increasing cost of insurance, etc.; (9) that the defendant has the tools, men, and machinery ready to remove the same, and will do so unless restrained; (10) that defendant will not encase his said frame building with stone, iron, or brick, so as to render it fireproof. The court sustained the demurrer, to which appellant excepted, and stood on his complaint, whereupon the court rendered judgment for appellee, from which ruling and action of the court appellant duly appealed. In the case here presented, the complaint avers, and the demurrer admits, that the removal and relocation of the appellee's frame building, as threatened, will put the appellant's property in imminent danger from fire.

From the briefs of counsel it appears that one point made by counsel for the appellee, in argument on the demurrer before the court below, was "that the plaintiff was not entitled to maintain this action, but that the city would alone enforce the penalty provided by the ordinance," "or, in other words, that an individual could not have an injunction in such a case, even if the ordinance in question here was in all its provisions valid, as being within the power of the common council to adopt, because the only remedy in such case was by a prosecution in the name of the city for a violation of the ordinance." Counsel say they do not rely upon this proposition. They concede that "where an individual shows that he suffers or will sustain special damages or injury, above and beyond what the public generally will suffer, by reason of anything which may constitute an injury or damage to the public generally, he may maintain such an action as is proper in the given case to recover damages for, or to prevent, the doing of such a thing." An individual has, and always had, the right to enjoin the erection or continuance of a nuisance, where he will suffer a special injury or annoyance, different in kind and degree to that sustained by the public generally. *Keiser v. Lovett*, 85 Ind. 240; *Reichert v. Geers*, 98 Ind. 73; *Owen v. Phillips*, 73 Ind. 285. In *Baumgartner v. Hasty*, 100 Ind. 575, at page 579, it is said: "It is one of the oldest common-law rules that an individual citizen may, without notice, abate a nuisance, and, if necessary to effectually abate it, destroy the thing which creates it." A wooden building is not a nuisance per se. It is the circumstances that make it a nuisance. A powder mill is not a nuisance per se, nor is a slaughterhouse or glue factory, but, if located in populous neighborhoods, they are nuisances; and "even when they are originally built in a place remote from the habitations of men, or from public places, if they become actual nuisances by reason of roads being afterwards laid out in their vicinity, or by dwellings being subsequently erected within the sphere of their effects, the fact of their existence prior to the laying out of the roads or the erection of the dwellings is no defense." *Wood, Nuis.* 572; *Reichert v. Geers*, 98 Ind., at page 75; *Baumgartner v. Hasty*, supra. In the case last cited, *Elliot, J.*, says: "A wooden building is not in itself a nuisance but when erected in a place prohibited by law, and where it endangers the adjoining property, it may become a nuisance. * * * There are many things that are not nuisances per se, but which become such when placed in locations forbidden by law," etc., citing *Wood, Nuis.* § 100. We think the complaint under consideration brings this case within the rule thus laid down, as it is alleged that the building is a wooden structure, that it will be removed to a place within the fire limits in violation of a city ordinance forbidding it, and that it will be located within 10 feet from the

plaintiff's frame house, making the danger imminent.

Upon the proposition "that the common council of the city of Terre Haute had no power to pass the ordinances in question," it is insisted that, "inasmuch as the charter had granted certain specific powers to the city, * * * none other could be exercised." The charter provisions are found in Rev. St. 1881, § 3106 (Burns' Rev. St. 1894, § 3541, subd. 32), which provides that the common council shall have power "to prevent the erection of wooden buildings in such part of the city as the common council may determine." Also in sections 3198 and 3199, Rev. St. 1881, being 3661 and 3662, Burns' Rev. St. 1894. It is clear that the specific power granted by subdivision 32, supra, is to prevent the "erection" of wooden buildings. Nothing is said about the "removal," and it is insisted, therefore, that so much of the ordinance as attempts to prevent the removal of wooden buildings within or without the fire limits is ultra vires and void, and in contravention of common right of an owner to do as he pleases with his own property. The provisions of the ordinance are, in brief, as follows: Section 1 defines the fire limits; section 2 provides that no frame building shall be erected within the fire limits; section 3 provides a penalty for removing or assisting to remove any frame building from a point within or without to a point within the said fire limits; section 4 provides that any building so erected or removed shall be deemed a nuisance; section 5 provides against the location of lumber yards within said limits. Appellant admits that the authority to pass an ordinance against the removal of a wooden building is not specifically granted, but insists that it comes within the intention of the legislature; that the object of granting the power to the city was to enable the common council to take precautions against the destruction of the city by fire. In the case of *Clark v. City of South Bend*, 85 Ind. 276, the same point was presented that is now urged, but the court said: "This is a more narrow view of the subject than the books warrant counsel in assuming." If the ordinance in question concerning removals of buildings is so in derogation of common right as to be void, and if the common council is restricted in its legislative acts to such ordinances only as are literally in compliance with the statutes, it could not prohibit the removal of frame buildings, but only the erection thereof within the limits, and any person so desiring could construct his house outside of the fire limits, and then remove it to a place within, and by a series of removals there might be no end of frame buildings brought within such limits. Such construction would permit parties to accomplish indirectly what they could not do directly, and so evade the ordinance as to render it nugatory. If the power is to be strictly construed, what is there to prevent

the erection of a lumber yard upon each vacant lot of the city? The express power is "to prevent the erection of wooden buildings." A lumber pile is not a building, and there is no express power given the city to prevent a lumber yard within the fire limits; yet who would question the inherent right of the council, in the exercise of its police power, to provide against and inhibit the heaping of such combustible material so as to endanger property rights? In the case of *Clark v. City of South Bend*, supra, the ordinance prohibited the accumulation of straw. The court said: "There can be no doubt that the legislature meant to confer broad powers upon municipalities in the matter of providing against danger from fires." And the ordinance was held valid, even though, as here, there was no express power. It is simply a police regulation, and as is said in *Brady v. Insurance Co.*, 11 Mich. 425, "of the power of the common council to pass the ordinances in question we have no doubt. They contravene no provision of the constitution as we read it, and they were made in the exercise of a police power necessary to the safety of the city." It is provided in section 3155, Rev. St. 1881, being section 3616, Burns' Rev. St. 1894, that "the common council shall have power to make other by-laws and ordinances not inconsistent with the laws of the state, and necessary to carry out the object of the corporation." We think the ordinance in question violates no provision of the constitution or laws of this state, and that, without any charter provision, the ordinance would be a valid act, based upon an inherent right. We are aware that the doctrine of "inherent right" is disputed in some of the states as appears by the following authorities: *State v. Schuchardt* (La., 1890) 7 South. 67; *Kneedler v. Borough of Norristown*, 100 Pa. St. 368; *City of Des Moines v. Gilchrist*, 67 Iowa, 210, 25 N. W. 136; *Pye v. Peterson*, 45 Tex. 312. But in 15 Am. & Eng. Enc. Law, p. 1170, it is said: "The decided weight of authority in this country is that municipal corporations have the power, under the general welfare clauses usually contained in their charters, without express legislative grant, to establish fire limits, forbidding the erection of wooden buildings, etc." To support this doctrine the author cites a great number of decisions, and in note 1 says: "These cases all rest on solid principle, for the rule has always been that a municipal corporation has the inherent power to enact ordinances for the protection of the property of its citizens against fire,"—citing the cases, among others, of *Clark v. City of South Bend*, supra; *Baumgartner v. Hasty*, supra; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659; *Kent, Comm.* 339.

The remaining question to be considered is: Was there an erection of a building, or a removal thereof, within the meaning of the ordinance? In some of the states the removal of a building, and locating the same

upon another spot, is held to be an "erection." *Wadleigh v. Gilman*, 12 Me. 403. Also, "to enlarge or elevate a wooden building so as to alter its character is an erection of such building within the meaning of the ordinance." *Douglass v. Com.*, 2 Rawle, 262. In Connecticut, however, a removal taking place wholly within the fire limits is not such "erection." *Dagget v. State*, 4 Conn. 60; *Booth v. State*, Id. 65; *Tuttle v. State*, Id. 68; *State v. Brown*, 16 Conn. 54; *Brown v. Hunn*, 27 Conn. 334. The word "erect" is defined in *Anderson's Law Dictionary*, p. 410: "To lift up, build, construct; as, to erect a building, a fixture. Removing a building is not erecting it, nor is elevating or materially changing it." The weight of authorities supports the position held by the courts of Connecticut on this question. It is insisted by the appellee that, as the act threatened does not contemplate the taking of the house from the lot it occupies, it would not constitute a removal within the meaning of the ordinance. Webster defines the word "remove" to be: "To move away from the position occupied; to cause to change place; to displace; as, to remove a building." Of course, the removal must be a substantial one. The mere turning of a building, or the change of the foundation so as to permit the erection of a bay window, could hardly come within the rule. But the fact that the structure is not to be taken from the lot upon which it was originally built, or where it stands, cannot be the criterion. The word "lot" contains no legal or other meaning as to quantity, except it is a distinct portion of land, usually smaller than a field. It is such part as the owner may fix in his plat. It may be large or small. A man might move his house over considerable space, and still leave it on his lot. If the house were taken from one man's land and located on another's, there can be no doubt it would be a removal, and yet the test is not that by the contemplated change the house is to be set in a particular

spot or position. The allegation is that the appellee was about to remove it 20 feet nearer appellant's land, and within 10 feet of his house. That assertion is admitted by the demurrer to be true. This court cannot say, as a matter of law, that a removal of 20 feet is not a substantial removal of the house. If it was not a removal, the facts showing that it was a mere change should have been stated by way of answer. The language of the complaint is: "That defendant is about to remove the said frame building upon his lot, and relocate the same within said [fire] limits, 20 feet nearer the plaintiff's house, and within 4 feet from plaintiff's property, and 10 feet from plaintiff's frame house," etc. It will be thus seen the charge is that defendant is about to remove and relocate the entire building. The expression used negatives the idea that the mere form of the building was to be changed, and conclusively shows that the intended change materially increases the risk and danger from fire to plaintiff's building, and also increases the rate of insurance. It is true a removal of 20 feet is not a great one, but, if the appellee can evade the provisions of the ordinance by removing his house and relocating it 20 feet away from its former location, on like reasoning why not 200 or 2,000 feet? If appellee had sold part of his lot, and the purchaser had desired to buy and remove the house in question 20 feet nearer plaintiff, and relocate it upon the part of the lot so purchased, would anybody contend it would not constitute a removal? We think it can make no difference as to whom the property upon which it is to be removed and relocated belongs. When the common council of the city defined the fire limits, it is presumed they did so with reference to the exact location of all the buildings within the limits. In our opinion, the court erred in sustaining the demurrer to the complaint. For this error the judgment of the court below is reversed, and the cause remanded, with instructions to overrule said demurrer.

COCHRANE v. MAYOR, ETC., OF CITY OF FROSTBURGH.

(31 Atl. 703, 81 Md. 54.)

Court of Appeals of Maryland. March 26, 1895.

Appeal from circuit court, Allegany county.

Action by Jennie Cochrane against the mayor and council of Frostburgh. Judgment for defendant, and plaintiff appeals. Reversed.

Argued before ROBINSON, C. J., and BRYAN, McSHERRY, FOWLER, PAGE, ROBERTS, and BOYD, JJ.

Benj. A. Richmond and Robt. R. Henderson, for appellant. David W. Sloan and A. A. Doub, for appellee.

BOYD, J. The appellant sued the appellee for injuries sustained by her by being horned, tossed, thrown down, and trampled upon by a cow which attacked her while she was walking along a lane or street of Frostburgh. The defendant demurred to the declaration, and the demurrer was sustained by the court below, and judgment entered for the defendant. From that judgment this appeal was taken, and we are therefore to inquire into the legal sufficiency of the declaration, and determine whether the facts therein stated, which are admitted by the demurrer, give the plaintiff a right of action.

It is alleged that the defendant was by its charter vested with control over all the streets, lanes, and alleys of Frostburgh, and with full power to provide by the passage and enforcement of ordinances for the comfort, good order, health, and safety of all the inhabitants of said town residing within the limits and passing along and over its streets, lanes, and alleys, and with power to prevent and remove all nuisances in said town, and to shield and protect said inhabitants therefrom; that the said town is laid off into streets and alleys, contains between four and five thousand inhabitants, and is compactly built, so that there is a great deal of travel and walking on said streets and alleys. It is further averred that large numbers of horses, cows, hogs, and horned cattle were turned loose and permitted to run at large upon the streets, unattended, during the day and night, by means of which "said stock, and particularly said cows (they being armed with dangerous horns and equipped with annoying bells), became a common nuisance, and a source of great annoyance and danger to persons passing along said streets and alleys, and particularly so as to women and children, who were attacked and frightened by said stock, whereby the safety and comfort of the inhabitants and the good order of said town were destroyed, and whereby the same became, and, at the time of the grievances hereinafter set out, was, a common and notorious nuisance, and a constant source of dangerous discomfort to the inhabitants of said town." It is then charged that by rea-

son of the powers contained in the charter it became the duty of the defendant to pass and enforce ordinances to abate and prevent said nuisance, and to prevent said animals from running at large, and require their owners to keep them off the streets, unless attended by some person in charge thereof; but that the defendant, unmindful of its duty, negligently and wrongfully failed and refused to pass any such ordinances for the preventing and abating said nuisance, and negligently, willfully, and wrongfully refused to take any steps whatever to prevent said stock and troublesome and dangerous animals from running at large on said streets, and that, while said nuisance still continued, plaintiff was walking on a street or lane of said city, using due care and caution, and was attacked by one of the said cows and horned cattle so by the said defendant negligently and wrongfully allowed and permitted to be at large upon the said streets, and was violently horned, tossed, thrown, and trampled upon, etc. The injuries sustained by plaintiff are then set out in detail, showing that both of her arms were broken, her side torn, and that she was otherwise seriously and permanently injured.

If the defendant can be held responsible in any case to one lawfully using its streets for injuries inflicted by a cow running at large, the allegations in this declaration are certainly sufficient to entitle the plaintiff to recover, if she can sustain them by competent proof. In determining whether the defendant is so liable, we will consider: (1) Has the mayor and city council of Frostburgh power, under its charter, to prevent stock from running at large within the corporate limits? (2) If it has such power, what are the consequences of its neglect or failure to do so?

Article 1, § 144, of the Code of Public Local Laws authorizes the mayor and city council of Frostburgh to pass such ordinances, not contrary to law, as they may deem beneficial to the town; gives the power to remove nuisances and obstructions upon the streets, lanes, and alleys, and to ordain and enforce all ordinances, rules, and regulations necessary for the peace, good order, health, and safety of the town, and of the people and property therein; and authorizes them to impose fines, forfeitures, or imprisonment for the violation of any ordinances of the town. These powers are, in substance, the same as those of the charter of the city of Cumberland, which were passed upon in the case of Taylor v. Mayor, etc., 64 Md. 68, 20 Atl. 1027. This court there held that the defendant was authorized and required under its charter to prevent persons from coasting on the streets, if it could do so by ordinary and reasonable care and diligence, and declared such use of the streets to be a nuisance. There was no special authority given in the charter of Cumberland to prevent coasting on the streets,

but the power of the city to do so was not only not questioned, but was expressly recognized, in that case. If a municipality can without express powers in its charter prohibit the use of its streets for coasting, why should it not have the power to prohibit the use of them by horses, cows, hogs, and horned animals "during both the night and in daytime, and at all times and on Sundays," as it is alleged in the declaration, especially when the cows are "armed with dangerous horns and equipped with annoying bells"? It is difficult to imagine a condition of things more calculated to injuriously affect, if not destroy, "the peace, good order, health, and safety of the town, and of the people and property therein," than that described in the declaration. It is true that the decisions are not uniform as to whether what is called "the general welfare clause," usually contained in charters, authorizes municipal corporations to restrain domestic animals from running at large, but many of them so hold. See 15 Am. & Eng. Enc. Law, 1188, and note, where a number of them will be found collected together. There can be no good reason assigned why it should not, unless there be some statute law or some other provision of the charter inconsistent with such construction. In those cases in which it is held that municipal corporations cannot without special authority pass and enforce ordinances of this character it will generally be found, upon examination of them, that it is by reason of some statute or other special cause that would not apply to the case under consideration. For example, in the case of *Collins v. Hatch*, 18 Ohio, 523, so much relied on by the learned counsel for the appellee, the court said that an ordinance to restrain horses, cattle, swine, etc., from running at large could not be adopted under the general welfare clause, as it would be in contravention of the general laws of that state, which allowed such animals to run at large. Is it to be said that the owners of horses, cows, and other animals can turn them loose in the public streets of a town such as described in the declaration, and the authorities have no means to prevent it unless the legislature has given them express power? It is not necessary to determine whether domestic animals can be impounded and forfeited without express authority being given in the charter, but, with powers as broad as those in the charter of defendant, there would seem to be no valid reason why it could not pass and enforce ordinances prohibiting stock from running at large, and imposing penalties for the violation of them. If the owners of cows and horses tied them along the public streets of Frostburgh so as to interfere with the free passage of people having the right to use the streets, it could not be successfully contended that the authorities were without remedy. Why, then, should they be permitted to turn them loose, thereby not only obstructing the free and

proper use of the streets, but permitting them to wander over the sidewalks, to frighten and possibly injure women and children? It was contended by the appellee that it is customary in this state to grant special powers to such municipal corporations as desired to prevent stock from running at large, and hence, when it is omitted from a charter, the presumption is that it was not intended by the legislature that such power should be exercised. We do not think that such a conclusion can properly be drawn. Various reasons might be given for such omission. Some of those municipalities may have been so disturbed by animals running at large that they wanted to emphasize that power to restrain them, or they may have thought it safest to include such powers, to avoid any question. In the brief for appellee certain towns are named which have the power expressly granted them to prevent cattle from running at large, and it is stated that Hagerstown, Frederick, and others have no such power conferred on them. It would seem to be a most unreasonable construction to place upon the action of the legislature to say that, inasmuch as it has granted this express power to some towns of the state, but has omitted it in the charters of Hagerstown and Frederick, therefore these two cities, which are among the largest in the state, were intended by the legislature to be prohibited from exercising such powers. There may be no such provision in the charter of Baltimore city, yet it would scarcely be claimed that it could not prohibit stock from running at large under the general powers vested in it. The object of such a provision as the general welfare clause is to cover those cases not specifically designated. It would be impossible to enumerate in detail in a charter of ordinary length all the powers that a corporation could exercise. The very effort to name them all might exclude some that were omitted, but would have been authorized under the general welfare clause, if an attempt had not been made to itemize them. We think it clear that the defendant has the power under its charter to pass and enforce ordinances to prevent stock from running at large within its limits, and that the condition of affairs described in the declaration is a nuisance of such character as should be abated, for the peace, good order, and safety of the people and property of the town.

It becomes necessary, therefore, to consider the second inquiry above suggested, namely, what are the consequences of the neglect or failure of the defendant to exercise its powers? We have been referred to a number of authorities outside of this state to the effect that a municipality is not liable for the injuries sustained by reason of its failure to abate a nuisance, although it has power to do so. But that is no longer an open question in this state. It was said in *Marriott's Case*, 9 Md. 174, that, when a stat-

ute conferred a power upon a corporation to be exercised for the public good, the exercise of the power is not merely discretionary, but imperative, and the words "power and authority" in such case may be construed "duty and obligation." It was there held that the city of Baltimore was required to pass ordinances sufficient to reach the exigencies of the case, and was bound to see that they were enforced. Mason, J., in delivering the opinion in that case, said: "The people of Baltimore, in accepting the privileges and advantages conferred by their charter, took them subject to the burthens and restrictions which were made to accompany them under the same charter. One of those burthens was the obligation to keep the city free from nuisances. A disregard of the obligations thus imposed would be attended with the same consequences which would result to the individual at common law were he to disregard his obligations to the community in these particulars. As the duty is the same in a corporation as an individual, so are the consequences the same for its disregard." On page 175 the court quotes with approval from the case of Pitts-

burgh v. Grier, 22 Pa. St. 65, that "It is no matter whether that duty [removing a nuisance] remains unperformed because it had no ordinances on the subject, or because, having ordinances, it neglected to enforce them. The responsibilities of a corporation are the same in either case." In Taylor's Case, supra, it was held that the corporation was under an obligation to exercise for the public good the powers conferred on it by its charter to prevent nuisances, and to protect persons and property. So, whatever may be the law elsewhere, it is well settled in this state that a corporation having such powers must exercise them, and is ordinarily liable for its failure to do so to any person who has received special damage therefrom, who is not himself in fault. Of course, as was said in Taylor's Case, if it use ordinary and reasonable care and diligence to prevent the nuisance, its duty is discharged, and it is relieved from responsibility, and a vigorous effort to enforce its ordinance on the subject would fulfill its duty in this respect.¹

* * * * *

¹ Part of the opinion is omitted.

SOUTH COVINGTON & C. ST. RY. CO. v. BERRY, Mayor, et al.

(18 S. W. 1026, 93 Ky. 43.)

Court of Appeals of Kentucky. March 19, 1892.

Appeal from chancery court, Campbell county.

Action by the South Covington & Cincinnati Street-Railway Company against A. S. Berry, mayor, and others. Judgment for defendants. Plaintiff appeals. Affirmed.

Simrall & Mack, for appellant. Chas. J. Helm, for appellees.

HOLT, C. J. The appellant, the South Covington & Cincinnati Street-Railway Company, has the charter privilege of operating a street railway upon certain streets of the city of Newport. The driver of each car also acts as conductor. The line has been operated in this way for over 20 years. The board of councilmen passed this ordinance: "That all street-cars running in the city of Newport shall have two persons—a driver and a conductor—on each car; and every failure to have said driver and conductor on each car shall subject the president and each of the officers of the company controlling said car or cars to a fine of not less than twenty-five dollars or more than one hundred dollars for each and every day; and the police of said city shall cause any car without driver and conductor to be returned to the stable." The appellees, the mayor and chief of police of the city, being about to enforce the ordinance by having the company's officers arrested, and its cars returned to the stable, this action was brought enjoining it.

If the ordinance was invalid, then, to prevent a multiplicity of prosecutions, and such consequences as would necessarily result from its enforcement, the company had a right to ask preventive equitable relief. This is often done to prevent illegal exercise of power by municipal authorities. *Brown v. Trustees*, 11 Bush, 435; *City of Newport v. Bridge Co.* (Ky.) 13 S. W. 720. The supreme court of the United States said in *Ewing v. City of St. Louis*, 5 Wall. 413: "With the proceedings and determinations of inferior boards or tribunals of special jurisdiction courts of equity will not interfere, unless it should become necessary to prevent a multiplicity of suits or irreparable injury, or unless the proceeding sought to be annulled or corrected is valid upon its face, and the alleged invalidity consists in matters to be established by extrinsic evidence." Several questions are presented as to the ordinance: First. Had the city the power to enact it? Second. Was it an exercise of police power? Third. Does it impair the company's contract rights? Fourth. Can it be enforced by a return of cars to the stable? The city charter provides: "They [board of councilmen] shall have power to pass all ordinances and by-

laws, not in conflict with this charter or the constitution of this state, that may be necessary for the due and effectual administration of right and justice in said city, and for the better government thereof. They may affix such penalties for violation of ordinances, not to exceed one hundred dollars, or imprisonment in the work-house or jail not exceeding six months, or both, in the discretion of the court, for each offense, as they may deem the good order and welfare of the city may require." It also provides: "They shall have power to cause the removal or abatement of any nuisance. * * *" The powers of a municipality are confined to those expressly granted, or those essential to the execution of those so granted. They are mere agencies of the sovereign authority of the state, and can therefore exercise no powers except those expressly conferred, or those essential to the accomplishment of the purposes of the incorporation. They must be either expressly granted, or necessarily implied as incident to those so granted, or essential to the object and purposes of the corporation. Clearly no power is attempted to be expressly given in the charter to regulate the number of employes on the street-railway cars, or how they shall be operated; but, if the requiring of both a driver and a conductor be the exercise of the police power, then the provision of the charter above cited authorized the enactment of this ordinance. If it be not a police regulation, but a mere attempt to enter into and regulate the company's business, then it cannot be sustained. These cars run between the cities of Newport, Covington, and Cincinnati. The name of the corporation indicates the line. They pass through crowded thoroughfares and centers of crowded population. Persons are constantly getting on and off the cars. They are in great part women and children. The cars are apt to be crowded, at least in the morning and evening, as persons go and return from their business. If it be said they have heretofore been operated without both a driver and conductor, it can also be said the cities have grown, and the travel has doubtless increased. While the privilege has been granted to the company to operate a street railway, yet this does not deprive the city government of the power to make reasonable regulations for its enjoyment in such a way as will be consistent with the safety of the public. No contract right of the company enters into the question. There has been no attempt to contract away this power. The mere granting of a charter to operate the railway did not constitute any such attempt; and, if it had been attempted, it would be unavailing, because government cannot divest itself of the police power; and the passage of this ordinance, looking, as it does, to the safety of the public, was a proper exercise of it, and not unreasonable or oppressive in character. The cases of *Railroad Co. v. City of Brooklyn*, 37 Hun, 413, where a city ordinance required both a driver and conductor

upon each car; and *Ravenna v. Pennsylvania Co.*, 45 Ohio St. 118, 12 N. E. 445, where the ordinance required a railroad company to keep a watchman at a street crossing to give warning to passers-by of approaching trains, —denied the power of the municipalities to enact the ordinances, because the state legislature had reserved to itself the power to regulate these matters. And in *Darst v. People*, 51 Ill. 286, where an ordinance declared all liquor kept within the town for the purpose of being sold or given away and drank within the town a nuisance, and directed the police to remove it beyond the town limits, it was held they could not seize and carry it away save through a judicial instrumentality, as the owner had a right to have it determined whether it was kept for sale or gift to be drank in the town, as in that event only was it declared to be a nuisance. Obviously these cases are not like this one.

It is said, however, that no power existed to direct the return of a car not having both a driver and a conductor to the stable; that this is an enforcement of the ordinance without a trial, and the infliction of punishment before the party has been found guilty by judicial process. It is in no sense, however, a forfeiture of the property, but merely authorizes an effective exercise of the police power. If, for instance, a car were found without both a driver and a conductor, is it to be merely stopped, and remain upon the street, blockading travel, and constituting a nuisance? Suppose a municipality, in the

exercise of the police power, were to forbid the driving of elephants or other wild animals through its streets, and some were found upon them, would it not have the power to direct their removal? It is upon this idea that the impounding of stock running at large in a town or city may be authorized by ordinance. *McKee v. McKee*, 8 B. Mon. 433. While they may be removed from the streets, where they, by reason of the ordinance, are a nuisance, yet it is true they cannot be sold, and the owner divested of his property, without judicial proceeding. This would deprive him of his property without due process of law. *Varden v. Mount*, 78 Ky. 86. The ordinance in question, however, does not attempt this, but merely protects the public from the danger existing from running the cars without proper control and sufficient force; and, if it be attempted, provides for their removal, to prevent their becoming a nuisance. In the case of *Railroad Co. v. Richmond*, 96 U. S. 521, where an ordinance provided that no car or engine of a certain railroad should be propelled by steam upon that part of its track upon a portion of a certain street in the city of Richmond, it was held that the ordinance did not impair any vested right of the company, nor deprive it of its property without due process of law. It was a mere regulation of the use of it within the city, and not a "taking" within the meaning of the constitutional prohibition. This is the effect of the ordinance now in question, and the judgment dissolving the injunction against its enforcement is affirmed.

STATE ex rel. SCHOOL DIST. NO. 6 OF THURSTON COUNTY et al. v. MOORE, Auditor.

(63 N. W. 130, 45 Neb. 12.)

Supreme Court of Nebraska. May 1, 1895.

Original application, in the name of the state, on the relation of school district No. 6 of Thurston county and the State Bank of Pender, for mandamus to Eugene Moore, auditor of public accounts. Denied.

James H. Macomber, for relators. A. S. Churchill, Atty. Gen., for respondent.

HARRISON, J. It appears from the application for a writ of mandamus in this action that school district No. 6 of Thurston county, one of the relators, had contracted an indebtedness of \$1,365.26, and had issued warrants evidencing the indebtedness, of which the State Bank of Pender, also a relator, had become the owner by purchase. No question is raised in the pleadings of the good faith of either the issuance of the warrants by the school district or their acquisition by the bank, nor is their validity attacked. The school district was unable to pay the amount due the bank upon the warrants, and, as a result of negotiations between its officers and the bank, it was agreed that the school district would issue its bonds in the sum of \$1,250, which the bank would receive in full of the indebtedness. The bonds were issued, and the warrants held by the bank were surrendered and canceled. The bonds were presented to Hon. Eugene Moore, the auditor of public accounts (respondent herein), for registration, and, upon his refusal to register them, this action was brought in this court, the relief sought being to compel the auditor to comply with the relator's demand for registration of the bonds. The auditor demurred to the petition or application of relators, and thus put in issue the authority of the school district to issue the bonds, and the rights of the parties to require them to be registered.

The law to which our attention is directed, and pursuant to the provisions of which the relators assert they acted in making the agreement which they did, and which, it is claimed, empowered the school district to issue the bonds for the purpose and in the manner it did, was passed during the legislative session of 1887 (see Sess. Laws 1887, p. 100), and reads, in the portion which we need notice, as follows:

"An act to authorize counties, precincts, townships, or towns, cities, villages, and school districts to compromise their indebtedness and issue new bonds therefor.

* * *

"Section 1. That any county, precinct, township, or town, city, village, or school district is hereby authorized and empowered to compromise its indebtedness in the manner hereinafter provided.

"Sec. 2. Whenever the county commissioners of any county, the city council of any city, the board of trustees of any village, or the school board of any school district, shall be satisfied by petitions or otherwise, that any such county, precinct, township or town, city, village, or school district, is unable to pay in full its indebtedness, and two thirds ($\frac{2}{3}$) of the resident tax payers of such county, precinct, township, or town, city, village, or school district, shall by petition ask that such county, precinct, township, town, city, or village or school district to compromise such indebtedness, they are hereby empowered to enter into negotiation with the holder or the holders of any such indebtedness, of whatever form, scaling, discounting or compromising the same.

"Sec. 3. Whenever satisfactory arrangements are made with the holder or holders or any of them, of any such indebtedness, and upon a surrender of the same for cancellation or satisfaction, the county commissioners, for and on behalf of any such county, precincts, townships, or towns, or the city council of any such city, or the board of trustees of any such village or school board of any such school districts, upon petition of two thirds ($\frac{2}{3}$) of the resident taxpayers of such county, precinct, township, or town, city, village, or school district shall have authority, and they are hereby empowered to issue the bonds of such county, precinct, township or town, city, village, or school district, to the holder or holders of the indebtedness so surrendered, cancelled, or satisfied for the amount agreed, upon not exceeding the original indebtedness.

"Sec. 4. Before issuing bonds under the provisions of this act, the board issuing the same shall by resolution enter upon its records recite the number and denomination of the bonds to be issued, the rate of interest and to whom and when payable. Such bonds shall be payable in not more than twenty (20) years from the date of their issue, or at any time before maturity, at the option of such municipality. They shall bear interest at a rate not exceeding seven (7) per cent., nor the rate borne by the bond surrendered, with interest coupons attached, payable annually or semi-annually. * * *

During a number of years school districts in this state issued bonds for certain purposes, by virtue of the right given them by law to borrow money; this court holding, when the question was presented to it for determination, that the power to issue bonds was implied from the authority conferred by statute to "borrow money." State v. School Dist. No. 24, 13 Neb. 78, 12 N. W. 927; also, State v. School Dist. No. 4, 13 Neb. 82, 12 N. W. 812. There was some legislation on the subject of school district bonds, their issuance, registration, etc., during the legislative session of 1875 (Sess. Laws 1875, pp. 118, 185); and in 1879 an act was passed by the legislature entitled "An act to provide for the issuing and payment of school district bonds,"

which repealed the former acts on the subject, and provided for the issuance of bonds to obtain money by the officers of school districts, for the purpose of purchasing a site for and erection thereon of schoolhouses and furnishing the same; that, prior to the issuing of any bonds, the subject of the bonding of the district must be submitted to the voters, and two-thirds of the qualified electors of the school district declare by their votes in favor of issuing the bonds; that a notice of such election be given at least 20 days prior to the day of the election; that no such vote be ordered unless pursuant to the request of a petition, signed by at least one-third of the electors of the school district, presented to the district board, suggesting that a vote be taken in relation to the issuance of bonds for the purposes specified in the petition and within the purposes stated in the act. This law of 1879 has been amended, but not so as to change its requirements in regard to presentation of a petition and the holding of an election being necessary to the authorization of an issue of bonds. There was also passed by the legislature of 1879 (Sess. Laws 1879, p. 176) "An act to provide for the funding of outstanding school district bonds," which provided that any school district in the state of Nebraska which has heretofore voted and issued bonds which remain unpaid is authorized to issue bonds to be substituted and exchanged for the original bonds, at a rate not to exceed dollar for dollar, and further providing that no vote of the people be required to authorize the issue of the new bonds. This act was amended in 1893, but the amendment need not be further noticed here. In 1887 came the act under which the bonds over which this controversy has arisen were issued, and which we have hereinbefore quoted. We have shown the condition of our law in reference to the subject under consideration to the extent it appears in the foregoing statement, for the purpose, in the main, of establishing, as it does, that, prior to the passage of the act of 1887, the power of the school district board to issue bonds was confined to instances where the legislature had authorized them to do so only when the proposition had first been submitted to and acted upon favorably by the body of the district (the voters), for at no time were the officers empowered to issue bonds except when the expenditure had the approval of the electors of the district, save in the funding act of 1879, and this only extended to bonds which had been previously voted and issued, the indebtedness evidenced by them having received the consideration, and, by their votes, the approval, of the electors of the district.

It is not contended by the relators that the bonds which the auditor refused to register were issued pursuant to any election at which the proposition of their issuance was voted upon by the electors of the school district relator, but that they were executed and delivered strictly in accordance with the require-

ments of the act of 1887, and it is not controverted by respondent that the provisions of the law of 1887 were in every essential fulfilled by the district officers in the issuance of these bonds. Hence the main question for our determination is, are the provisions of the act of 1887 sufficiently broad to authorize the issuance of bonds by a school district to substitute or exchange for an indebtedness of the district other than a bonded indebtedness? The other points noticed are only incidental to this, and important alone inasmuch as they bear upon and affect its disposition.

In the interpretation and construction of statutes, one of the cardinal rules is that it is the intent of the law that is to be sought after, and, if possible, ascertained; and where the law is expressed in words which are clear and not ambiguous, and no doubt as to its purpose and meaning can arise from the language employed, where to understand and know its intent it is but necessary to read, then there is no call for an interpretation; but where the intention and meaning of the lawmakers, as expressed in the statute enacted, is uncertain or obscure, as in the one now under consideration, a bare reading will not suffice, and we are obliged to resort to a construction of its terms and provisions. This statute contemplates the issue of bonds by officers of certain governmental divisions and subdivisions of our state, and necessarily carries with it a resort to the power of taxation of the people to raise the funds to meet the indebtedness created by such action, in the majority of instances not accorded until the proposition involved is submitted to and approved by a vote of the electors of the particular political body or subdivision whose tax bearers are to be affected thereby, and hence, agreeably to a well-established rule, is to be strictly construed, and, where there is any doubt, it must be resolved in favor of the public or taxpayers. The first section of the act under discussion enumerates the particular bodies or municipalities to which power is granted, and contains the authorization to compromise indebtedness without designation of any particular kind of indebtedness. Section 2 provides for the presentation of a petition by two-thirds of the resident taxpayers of the county, city, town, or school district, etc., asking that such a compromise be made, and empowers the proper officers to negotiate with the holders of "any such indebtedness, of whatever form, scaling, discounting, or compromising the same." The words "of whatever form," applied in explanation of the indebtedness, and making it include, as given their natural and ordinary purport they do, any and all indebtedness, seem to make the intention in relation to what claims were in contemplation and referred to by the legislature passing the act plain and certain; and, if there were no statements in other portions of the law bearing upon this same point, we might

well stop here content with the determination to which it would lead us. Section 3 of the law authorizes the issuance of the bonds upon the surrender and cancellation or satisfaction of the indebtedness and presentment of a petition by two-thirds of the taxpayers requesting such action. It does not designate or indicate any particular kind of indebtedness, but refers to it in each instance by the use of the general term. In section 4, in referring to the bonds to be issued, it is stated: "They shall bear interest at a rate not exceeding seven (7) per cent., nor the rate borne by the bond surrendered;" thus, it would seem, clearly indicating that it was an indebtedness evidenced by bonds which the legislator had in mind when he framed and introduced the bill containing the act in question, and in contemplation of the legislative body when it passed the act. From a study of the body of the law, we think it must be concluded that there is a doubt whether the compromise of all kinds of indebtedness is intended to be authorized, or only those of a bonded nature. It is a well-settled rule that, if the meaning conveyed by the body of the act is uncertain or in doubt, resort may be had to the title, and more especially is this the rule in jurisdictions where, as in our state, there is a constitutional provision requiring the subject of every bill to be clearly expressed in its title. In the title of this act the subject was stated as follows: "An act to authorize counties, precincts, townships, or towns, cities, villages and school districts to compromise their indebtedness and issue new bonds therefor." The portion which we desire mainly to notice is contained in the words "and issue new bonds therefor," and more particularly to the two words "new bonds." The principal object of a title of a bill is to convey to a person who reads it a general idea or knowledge of the contents of the act. To a person reading the title of this bill, the use of the word "new" in connection with the word "bonds," and allowing to them their ordinary signification, as must be done, and referring back and viewing them

coupled with the other idea expressed in the title,—i. e. the compromise of the existing indebtedness,—it seems clear that the natural thought would be bonds new for bonds old, given the appellation "new" in the title because issued in place or renewal of bonds which would be designated by the opposing word "old." We, then, have the use, in both title and act, of the general term "indebtedness," which, without anything to extend or explain it, would include all kinds of indebtedness. In one section it is stated to be intended to cover indebtedness of whatever form, which would include the warrants or school orders held by the bank, and which were surrendered on the issuance of the bonds presented, and which the auditor refused to register. On the other hand, we have the title stating that the act is to provide for new bonds, which conveys the idea of compromising, replacing, or renewing other or old bonds; a statement in the text that the bonds issued shall not bear interest at a rate in excess of that borne by the bonds surrendered, which, to say the least, leaves us in doubt and renders it uncertain whether the law was intended by the legislature to empower the issuance of bonds in the manner stated therein for the compromise of an existing indebtedness other than in the form of bonds. Add to these the thought that there was no provision for submitting the proposition of the issuance of these bonds to a vote, it being the wise and wholesome policy of our law to so submit such questions (involving, as they necessarily do, the levying of a tax) to the decision of the voters, who must pay the tax, and, further, that such laws are the subject for strict interpretation, and, if there is a doubt as to the intention, it must be resolved in favor of the taxpayers or public, and we are constrained to say that our conclusion is that the act we are considering did not empower the issuance of the bonds to replace the indebtedness, consisting, as it did, of school warrants or orders, and the writ prayed for in this action must be denied.

WETMORE v. CITY OF OAKLAND et al.
(No. 15,412.)

(33 Pac. 769, 99 Cal. 146.)

Supreme Court of California. July 25, 1893.

In bank. Appeal from superior court, Alameda county; W. E. Greene, Judge.

Action by J. L. Wetmore against the city of Oakland and others to determine the validity of city bonds issued for the purpose of building schoolhouses. The bonds were adjudged valid, and plaintiff appeals. Affirmed.

Edw. C. Robinson and E. A. Holman, for appellant. James A. Johnson, Davis & Hill, and James W. Goodwin, for respondents.

HARRISON, J. The legislature of this state, at its session in 1889, passed an act approved March 19, 1889, authorizing the incurring of indebtedness for municipal improvements, and issuing bonds therefor by cities, towns, and municipal incorporations, (St. 1889, p. 399,) the first section of which declares that "any city, town, or municipal corporation incorporated under the laws of this state may, as hereafter provided, incur indebtedness to pay the cost of any municipal improvement, or for any purpose whatever requiring an expenditure greater than the amount allowed for such improvement by the annual tax levy." By the next section of the act it is provided that whenever the legislative branch of the municipal corporation shall determine that the public interest or necessity demands the acquisition, construction, or completion of any municipal buildings or other municipal improvements, whose cost will be too great to be paid out of the ordinary annual income and revenue of the municipality, it may call an election for the purpose of determining whether bonds of the municipality shall be issued for such improvement, and if the proposition shall receive the vote of two-thirds of the voters voting at such election such bonds may be issued. September 23, 1891, the council of the city of Oakland passed an ordinance by which it declared that the public interest and necessities of the city of Oakland demanded the acquisition, construction, and completion of certain municipal buildings and improvements in that city for public school purposes, viz. certain designated schoolhouses, and that the cost thereof would be too great to be paid out of the ordinary annual income and revenue of the city; and afterwards passed an ordinance that the question of issuing bonds therefor to the amount of \$400,000 be submitted to the voters of the city at a special election to be held for that purpose. At that election, more than two-thirds of the voters having voted for the issuance of the bonds, suitable ordinances were passed by the council, and bonds of the city to the amount of \$400,000 were issued and sold prior to January 1, 1893, and the proceeds placed in the city treasury. In June, 1893, the appellant having chal-

lenged the validity of these proceedings, an agreed case was submitted to the superior court of Alameda county, under the provisions of section 1138, Code Civil Proc., for the purpose of having a determination by that court of the validity of the bonds. The superior court adjudged that they were valid obligations of the city of Oakland, and from its judgment this appeal has been taken.

The proposition presented by the appellant in support of his appeal is that the municipality of the "city of Oakland" has no power to issue its bonds for the construction of schoolhouses, for the reason that the management of its schools is vested in a board of education, and that any bonds to be issued for school purposes must be authorized by that body. The city of Oakland is governed by a freeholders' charter, which was approved by the legislature February 14, 1889. St. 1889, p. 513. Under this charter the legislative power of the city is vested in a council of 11 members, and the government of the school department is vested in a board of education consisting of 11 members. The board of education is by the charter vested with authority to "build schoolhouses" upon plans approved by it, but the work of building the schoolhouses is to be carried on through the medium of a board of public works. It is, moreover, expressly declared in the charter (section 131) that the board of education "shall not have power to contract any debts or liabilities in any form whatsoever against the city, exceeding in any year the income and revenue provided for the school fund for such year." By section 149 of the charter it is provided that "whenever the council shall determine that the public interest requires the construction or acquisition or completion of any permanent municipal building * * * the cost of which in addition to the other expenditures of the city will exceed the income and revenue provided for in any one year, they may by ordinance submit a proposition to incur a debt for such purpose, and proceed therein as provided in section 18, of article 11, of the constitution of this state and general law." By this section of the charter the same authority is conferred upon the council to create a bonded indebtedness as is given by the aforesaid act of the legislature, but the act of the legislature prescribes the steps to be taken, and is the "general law" under which it is necessary for the council to proceed in incurring such indebtedness. The provisions of the act of March 19, 1889, are general in their character, and give to every municipal corporation incorporated under the laws of this state the power to create a bonded indebtedness for any of the purposes authorized by the act. The indebtedness is not to be incurred, nor are the bonds to be issued, until after the voters of the municipality have so directed; but, as it is the vote of the electors which de-

termines that they shall be issued, it is immaterial to them what officers of the city carry out this vote. The act itself designates the legislative branch of the municipality as the body to determine in the first instance whether the public interest or necessity demands the construction or completion of the building or improvement, and also designates that body as the agency of the corporation through whose acts the indebtedness is to be created and evidenced. There is no particular mode provided by which the council shall ascertain this fact, but, in a matter which pertains to the public schools, the fact would naturally be ascertained by direct communication with the board of education, or by a request from that board, and, inasmuch as that board has no power to issue the bonds of the city, it is but natural to assume that it would manifest its wishes to the council. The question, however, is not how the council shall ascertain whether the public interest demands the improvement, but whether it has any power to issue the bonds after it has so determined, irrespective of the mode of ascertaining it. Although the board of education has been intrusted with the management of the schools, and it is the body designated in the charter to build the schoolhouses, there is nothing inconsistent with this provision for the legislature to designate the council as the body to give inception to the indebtedness and issue the bonds therefor. The power to build or improve the schoolhouses which is vested in that board is distinct from the power to borrow money with which to build or improve them. The board of education, as such, is forbidden by the charter from incurring any indebtedness beyond the annual income for school purposes, and as the constitution permits such indebtedness by any municipal corporation only after a vote of the electors therefor, it is competent for the legislature to designate the agent or body of the municipal government which shall act for it in carrying out the will of its electors, and for this purpose the legislative branch of that government would most naturally be selected.

That the education of the youth is properly included within the functions of a municipal government cannot be denied. A municipal corporation is but a branch of the state government, and is established for the purpose of aiding the legislature in making provision for the wants and welfare of the public within the territory for which it is organized, and it is for the legislature to determine the extent to which it will confer upon such corporation any power to aid it in the discharge of the obligation which the constitution has imposed upon itself. The constitution has declared (article 9, § 1) that, "a general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the legislature shall encourage

by all suitable means the promotion of intellectual, scientific, moral and agricultural improvement." In furtherance of this duty the legislature has made provision in the Political Code for a system of public schools throughout the state; and in the municipal government act, which was enacted in 1883, providing for the organization of municipal corporations, it has included a school department for the first five of the several classes of municipal corporations therein provided for. In each of the freeholders' charters that has been approved by it an educational department has been established, and provision made for education, and for the exercise of municipal functions in reference thereto. As schoolhouses are essential aids in the promotion of education, their erection is but incidental to the maintenance of the schools, and falls as completely within the functions of a municipal government as does the erection of a hospital for its indigent poor, or buildings for its fire engines; and the schoolhouses, when so erected, are as fully municipal buildings as are its engine houses and hospital buildings. *Danielly v. Cabaniss*, 52 Ga. 222; *Horton v. Commissioners*, 43 Ala. 598. In *Board v. Fowler*, 19 Cal. 24, the validity of a reservation by the Van Ness ordinance of certain lots for school purposes was involved, and the supreme court said: "The school department of the municipality is only a part of its government. A reservation of property for school purposes is not a disposition of it for the benefit of third persons, but a keeping of it for its own purposes. The resolution amounts only to the setting apart of property of the town for a particular town purpose, and in this respect is not different from a similar act, if such had been done, declaring that the plaza should be reserved as a public garden, or a lot for a jail, or a house for the holding of courts." See, also, *Board v. Martin*, 92 Cal. 209, 28 Pac. Rep. 799.

The provisions of sections 1880-1887 of the Political Code for the issuance by the supervisors of the county of school-district bonds whenever the electors of the district shall vote therefor, to pay for the building of schoolhouses in the district, do not limit or qualify the power conferred by the act of March 19, 1889, upon an incorporated city to issue its own bonds for the same purpose, notwithstanding the provisions of section 1576 of the same Code, making such incorporated city a school district. Each of these acts is a general law upon a subject within legislative power, and, if there is any inconsistency between them, that which is later in date must prevail over the earlier act. There is not, however, any inconsistency between the two acts. The bonds authorized by these sections of the Political Code are different obligations from those issued by the municipal corporation under the act of March 19, 1889. A school dis-

trict has not, like an incorporated city, any financial officers, nor has it been intrusted with the power of assessment and taxation which is conferred upon an incorporated city, and for these reasons as well as others the legislature would naturally intrust to the supervisors of the county, as being the body having the financial supervision of the school district, the function of issuing and providing for the payment of school district bonds; and as by the constitution bonds cannot in any case be issued except upon the vote of two-thirds of the qualified electors of the district voting upon the question of their issuance, the agency by which they might be executed would seem immaterial, and there would be little likelihood of an issuance being authorized to be made for the same purpose by each agency. It is, however, unnecessary to determine whether the power to issue bonds conferred by these sections of the Political Code exists in favor of the school district as a corporation, as well as of the incorporated city which constitutes the school district, or whether it has been superseded by the power conferred upon the city, as the bonds in question are those of the municipal corporation, and not of the school district; but, even if it should be conceded that the power to issue bonds for the same purposes rests in the supervisors at the instance of the school district, and also in the city itself, the bonds which are authorized by the Political Code are to be issued in the corporate name of the school district, which by section 1575 of that Code must be "— district of — county," whereas the bonds in question are those of the municipality of the city of Oakland, and their validity is to be determined by the power of the municipal corporation to issue them.

The question presented in *Kennedy v. Mil-*

ler, 32 Pac. Rep. 558, was the right of the treasurer of the city of San Diego to demand from the county treasurer the custody of certain public school moneys apportioned to the school district of San Diego, which had been derived from sources outside of the municipality, and not through any agency of the city, viz. the state school fund and taxes levied by the supervisors of the county, and it was held that they were moneys whose custody had been placed by the legislature with the county treasurer. The power of the city to raise money within its own territory for school purposes by tax or otherwise, or to retain the custody or make the disbursement of any moneys which might be raised from taxes levied by its council, did not arise in that case. On the contrary, we said that "the city is a corporation distinct from that of the school district, even though both are designated by the same name, and embrace the same territory. The one derives its authority directly from the legislature through the general law providing for the establishment of schools throughout the state, while the authority of the other is found in the charter under which it is organized;" and it follows that the acts of each corporation are to be measured by the authority under which they are performed, and their validity determined by a comparison with that authority. We hold, therefore, that the city of Oakland had the power, under the provisions of the act of March 19, 1889, to issue the bonds in question, and, as it was conceded at the argument that all the provisions of that act had been complied with, the judgment of the superior court is affirmed.

We concur: BEATTY, C. J.; PATERSON, J.; FITZGERALD, J.; DE HAVEN, J.

SIMRALL v. CITY OF COVINGTON.

MACKOY v. SAME.

(29 S. W. 880.)

Court of Appeals of Kentucky. Feb. 26, 1895.

Appeals from circuit court, Kenton county. "Not to be officially reported."

Separate actions by C. D. Simrall and William H. Mackoy against the city of Covington. From a judgment in each case dismissing the petition, plaintiffs appeal. Reversed.

Wm. Goebel and W. W. Cleary, for appellants. W. A. Byrne, for appellee.

PRYOR, C. J. These two cases come from the Kenton circuit court, and, as they involve similar questions, will be considered together. The two appellants, Mackoy and Simrall, had been employed, as they alleged, by the trustees of the Covington reservoir, to conduct the defense on the part of the board of trustees in actions instituted against that board by Casparis & Co., arising out of a contract between the parties to the action for construction of water reservoirs, and all things necessary mentioned in the contract, to supply the city of Covington with water. Casparis claimed a breach of contract on the part of the board, abandoned the contract, and suits were instituted by him involving large sums of money, exceeding in amount \$300,000. The board of trustees, having completed the waterworks, turned them over to the city of Covington, and thus ended their right to longer control them. The liability of the city is alleged to exist for the following reasons: An amendment was had to the charter of the city by which its council was authorized to appoint a board of trustees, five in number, who were to have these water reservoirs constructed, and their control until completed was committed to this board, under the name and style of the "Trustees of Covington Reservoir." This board was "authorized to sue and be sued, to contract and be contracted with," to purchase and condemn land necessary for the improvement, to issue and sell bonds of the city, to appoint, employ, and pay officers, agents, and employés, and to do all acts necessary for the completion of the work. The act also provided that this board should continue in office until the works or improvements were completed and in operation, and for not longer than two months thereafter. The trustees were duly appointed and qualified, and, as before stated, had completed the improvement, and ceased to have any further control. Bonds of the city had been issued and sold for the purpose of this work exceeding \$1,000,000, under various legislative enactments. The trustees, anticipating trouble with Casparis & Co., the contractors, at a called meeting of their board in July, 1889, by an order of the board, directed Judge O'Hara, who was a member of the

board, to contract for the employment of the appellants. At a meeting of the board held on August 7, 1889, Judge O'Hara made a written report to the board, as follows: "Covington, Kentucky, August 7th, 1889. To Trustees Covington Reservoir: The undersigned, appointed by a resolution of the board at the extra session held July 31, 1889, to employ C. B. Simrall and W. H. Mackoy to represent the trustees in any litigation they may have with Casparis & Co., begs to report that he has agreed with these gentlemen that they shall render such services as may be required of them in such litigation, and that the undersigned is to fix the fee for such services to be paid each of them by this board after the services shall have been performed. J. O'Hara." This report was adopted, and in April, 1890, Judge O'Hara requested of the two attorneys to sign an agreement by which he was to fix their compensation. They each signed an agreement to that effect, as follows: "Covington, Kentucky, April 15th, 1890. I have heretofore been employed by Judge O'Hara, as one of the attorneys of the trustees of Covington reservoir in their litigation with Casparis & Co., contractors, with them, for the construction of the Covington reservoir, and then and now agree that the compensation for my services to them in this behalf shall be fixed by said O'Hara when the service is rendered." The writings signed by the attorneys were reported back to the board, and concurred in. It is alleged that a protracted litigation followed, and pending the litigation, or when the work was completed, the trustees turned over to the city the balance of cash in their hands, and no longer acted as agents or trustees for the city. When the litigation terminated, which was after the waterworks had been constructed, Judge O'Hara was applied to by the appellants to fix their compensation, as provided by the agreement and approved by the board of trustees, and in the month of November, 1892, determined the compensation to be paid each of the attorneys, in writing. "Being called upon by C. B. Simrall, Esq., to fix the amount of his fee for services rendered by him in defense of the action of Casparis & Co. against the trustees of the Covington reservoirs in the U. S. circuit court at this place, and for such services as he rendered them in the controversy between said parties arising out of the contract between them and said Casparis & Co. for the construction of the reservoirs, in association with W. H. Mackoy, Esq., pursuant to an agreement between him and said trustees, I have fully considered his own statement, and the opinions of attorneys submitted by him, and those submitted by Mr. Byrne, the solicitor of the city of Covington, and have included in my consideration my own knowledge of the services and the rate of charges for attorneys' services prevailing in Kentucky within the range of my practice as an

attorney for more than thirty years past, and am of opinion, and so decide, that eleven thousand five hundred dollars is a fair and reasonable compensation to Mr. Simrall for his said services, and fix his fee at that amount, from which is to be deducted any sum or sums already received by him, if any, in that behalf. J. O'Hara." A similar writing fixed the compensation of Mackoy at \$6,000. A copy of each writing was handed to the city of Covington or its representative, and to Simrall and Mackoy. The city refused to pay the fees, and, these actions having been instituted upon the state of facts presented, a general demurrer was sustained to the petition of each of the appellants, and the actions dismissed.

It seems to us the only question in this case arising on the demurrer is as to the power of the trustees to enter into the contract for the services of these attorneys. If the right to employ counsel exists, then the contract entered into is binding, and should be enforced. The legislature saw proper to confide to this board of trustees the duty of having the waterworks constructed, and made them in effect the agents of the city of Covington for that purpose, and clothed them with all the powers necessary to discharge the duties imposed on them. They had the power to contract and be contracted with, to sue and be sued, to select their agents and employés, and in fact were invested with all powers the city would have had if the board of council had been selected instead of this board of trustees. It was an agent invested with all the powers of a principal in so far as the improvement was concerned. Having the power to sue, and the right of others to sue them as trustees when acting within the scope of their authority, it necessarily follows that they had the right to employ counsel to bring the action, or, if sued, to employ counsel to make their defense, and to make such contracts with reference to the employments as they could have made if contracting for their own benefit. The mode of contracting for the services of counsel is not provided for by the charter; and in this case, as the character of the services or their extent could not well be ascertained at the time the appellants were retained as counsel, we perceive no reason why an agreement to pay such a sum as one of their own board should deem reasonable and just should not be upheld. The nature of the contract was reported to the board, and by that body was ratified and approved, and the services rendered. There is no defense or bad faith alleged in any pleading, but an admission by the demurrer that the contract was made and the services performed. It was, however, insisted by counsel for the city in the oral argument that the authority given one member of the board to determine these fees was a delegation of a power that could be exercised by the board alone, and, unless the fees were

fixed by a majority of that body, the agreement to that extent is void. It was, as we see from the records before us, the action of the entire board (save one) by which the parties to the contract were to be bound by the sum fixed as compensation by Judge O'Hara. It was not one member of the board agreeing to the contract, but a decided majority approving and directing its execution; and, having entered into the agreement, they cannot now claim the right of determining for themselves as a board, or the city council for them, whether or not the sum fixed by the umpire is or not reasonable. The trustees had the discretion to settle questions of dispute in reference to the subject-matter under their control, by agreeing that the judgment of a third party should determine the controversy; and, instead of being a delegation of the power conferred on them in this case, it was an exercise of the authority given them to elect one of their board to adjust and determine the claims of these appellants. This contract was made before their agency terminated, and during the progress of the work, and in the exercise of a discretion that certainly belonged to them. The fact that one of the board was selected as the arbiter, or the person to determine the compensation, can make no difference. The right to do so originated from the contract between the trustees (O'Hara being one), on the one side, and these appellants, on the other; and although the trustees had turned the waterworks over to the city, and ended their connection with them, before the services of the attorneys had ended, and before O'Hara determined what the fees should be,—and this he could not do until the litigation was over,—still this did not affect the contract; nor can these parties, in their corporate capacity, be regarded as legally dead until their contracts are complied with. Such a satisfaction of a legal or equitable demand is unknown to the law. They might, and perhaps should, have been made parties to this litigation; but there was no special demurrer, and as the liability, if any, is to be discharged by the city, it is, at best, a formal objection, as both sides concede that the work is done, and the means of the agent passed over to the principal.

Counsel for the appellants refer to two cases conducing to remove the principal objection urged by counsel to the petitions. The mayor, aldermen, and burgesses of Liverpool, in behalf of the city, entered into an agreement with one Scott, that provided, among other stipulations, "that disputes between the parties should be referred to the engineer of the corporation of Liverpool, and his decision should be binding." 3 De Gex & J. 334. Also, in the case of Hartupee v. City of Pittsburgh, 97 Pa. St. 107, where the council of that city made a contract containing a similar provision, and in neither case was the objection raised that such contracts

were nullities. Numerous cases might be cited to the same effect, and are of constant occurrence; and it may be said that, where the power to contract exists, the price to be paid, the mode and kind of payment, may be determined by a third party, if such is the agreement, and not beyond the scope of the authority given, if the contract is made by an agent, or one clothed

with similar authority, as the trustees were in this case. In our opinion, the demurrer should have been overruled. Reversed and remanded for that purpose, and for proceedings consistent with this opinion. *Sweeney v. U. S.*, 109 U. S. 618, 3 Sup. Ct. 344; *Railroad Co. v. Northcott*, 15 Ill. 49; *Railway v. Cummins*, 6 Ky. Law Rep. 443; *Railroad Co. v. Price*, 138 U. S. 185, 11 Sup. Ct. 290.

KELLY et al. v. CITY OF MINNEAPOLIS.

(65 N. W. 115, 63 Minn. 125.)

Supreme Court of Minnesota. Dec. 9, 1895.

Appeal from district court, Hennepin county; Scgrave Smith, Charles M. Pond, Robert D. Russell, Robert Jamison, Henry C. Belden, Judges.

Action by Anthony Kelly and others against the city of Minneapolis. From an order denying a motion for a temporary injunction, plaintiffs appeal. Reversed.

J. B. Atwater and P. M. Babcock, for appellants. David F. Simpson, for respondent.

START, C. J. This action was brought to have a certain issue of the bonds of the city of Minneapolis, of the par value of \$200,000, known as "Reservoir Bonds," adjudged void, and to restrain the treasurer of the city from paying, out of the sinking fund of the city, any money for the purchase of such bonds for the sinking fund, pursuant to an agreement to that effect between the city council and the board of sinking fund commissioners. The plaintiffs are taxpayers of the city, and from an order of the trial court denying their motion for a temporary injunction so restraining the treasurer this appeal was taken. The bonds were issued under the provisions of chapter 204, Laws 1893, which forbids any city in this state to issue bonds or to incur any debt or liability of any kind for any purpose except for the purchase, refunding, or payment of outstanding bonds, in excess of 5 per cent. of the assessed valuation of the taxable property of such city according to the last preceding assessment. The plaintiffs claim that this 5 per cent. debt limit has already been exceeded by the city, exclusive of these reservoir bonds; and, further, that the board of sinking fund commissioners have no authority to purchase from the city its bonds at the time they are offered for sale by it.

1. The first question is, had the city, if the amount of the reservoir bonds be added to its debt, exceeded its debt limit at the time of the proposed sale of the bonds and the commencement of this action? In deciding this question the claim of the plaintiffs that the sum of \$206,567—an alleged indebtedness of the city to the courthouse and city hall commission—should be added to the indebtedness of the city, must be rejected, for it does not affirmatively appear from the record that, if there ever was any such indebtedness, it existed at the time stated in the question. Eliminating this claim, it is sufficient to say, without going into mathematical details, that it appears from the admitted facts that, if the amount of certain park board certificates hereinafter to be noticed is not a part of the indebtedness of the city, and if the amount of the money and bonds in the sinking fund of the city is to be de-

ducted from the total amount of the outstanding bonds of the city, the entire debt of the city, including these reservoir bonds, will not exceed its debt limit. The answer, then, to this first question involves a consideration of two subordinate ones: (a) Are the park board certificates an indebtedness of the city, within the meaning of the statute imposing the debt limit? (b) Is the amount of the money and bonds in the sinking fund to be deducted from the total amount of the city's outstanding and uncanceled bonds, for the purpose of determining its actual indebtedness? We are of the opinion that this first question must be answered no, and the second one yes, and we therefore answer the original question in the negative.

2. The park board certificates to which we have referred were issued under the provisions of chapter 30, Sp. Laws 1889, as amended, which provide for a board of park commissioners, and constitute such board a department of the government of the city of Minneapolis. This board is authorized to designate and acquire land in and adjacent to the city for public parks, and its here material powers are as follows: "The said board of commissioners, and their successors, shall have power, and it is hereby authorized, to obtain title for and in the name of the city of Minneapolis, to any lands so designated by it for the purpose of this act, by gift, devise, purchase or lease. And said board may enter into any contract in the name of said city, for the purchase of any lands to be paid for in such time, or times, and in such manner as the board may agree to; and said board may accept title to lands and give back a mortgage or mortgages in the name of said city, with or without bonds to secure the unpaid purchase price, provided, that no personal or general liability on the part of said city shall be created by any such contract, or mortgage, or bond beyond the means at the time available therefor, except the liability to pay such amounts as may be realized from benefits assessed on benefited property on account of the lands included in such contract or mortgage. And it is hereby made the duty of said board to pay on each such contract or mortgage, an amount equal to the sum or sums so realized from such assessments; and said board shall have power to accept and receive donations of money, property or lands, for the use of the said city for the purposes contemplated in this act." Sp. Laws 1889, c. 30, § 2, as amended by Id. c. 103, § 1. The certificates in question were given for the purchase price of land for park purposes, and their payment secured by a mortgage on the land purchased. Each certificate states that the city of Minneapolis is indebted to the payee in the sum therein named, and recites that the consideration therefor is the conveyance to the city by the payee of land for park purposes, and that the certificate is secured by a mortgage on the land sold, and

that it is payable out of the funds arising from assessments made upon real estate specially benefited by the park established on the land, and concludes with these words: "It being expressly understood and agreed that there is no liability on the part of said city to pay the amount evidenced by this certificate, secured by the above-described mortgage, out of any other fund than the fund above specified." No certificates issued or contracts made by the park board can be given any legal effect contrary to or in excess of the powers conferred upon the board by the statute we have quoted, and they are, in fact, substantially in accordance with its provisions. The board has no power to make these certificates a lien generally upon all the parks of the city, and the record shows that no attempt has been made to secure their payment by the creation of such a lien. The provisions of the statute relied upon by plaintiffs to support their proposition to the contrary (section 5, c. 30, Sp. Laws 1889) refer only to park bonds issued for the purpose of obtaining money with which to acquire land for park purposes. It is admitted that such bonds are a part of the indebtedness of the city. Neither are these certificates secured by a mortgage on any portion of the property of the city previously owned by it, nor by a pledge of its revenues, as claimed by the plaintiffs. If such was the case, then their contention that the certificates are a part of the indebtedness of the city would be correct, for the statute providing a debt limit for cities cannot be evaded by the makeshift of issuing the bonds or other obligations of the city, and make them payable only from the general revenues of the city to be derived from a particular source, or by securing them upon its public buildings or other property, which, if sold to pay the obligations, must be replaced by taxation, to enable the city to discharge its governmental functions. The authorities cited by counsel for the plaintiffs fully support this proposition. But such is not the case we are considering, for each certificate is a lien merely upon the particular land for the agreed purchase price of which it was given, not upon any property which the city previously owned. The deed, certificate, and mortgage are all one transaction, and after the mortgage is given the city has just as much interest in the land mortgaged as it had before. When the land is paid for, it will be the property of the city. If not, the certificate holder takes it on his mortgage. The debt of the city is neither increased nor diminished by the transaction. No revenues of the city which must be raised or replaced by taxation are pledged for the payment of the certificates. The statute expressly provides that the park board cannot create any personal or general liability on the part of the city by any certificates they may issue, except to pay such amounts as may be realized from assess-

ments on property benefited on account of the acquisition of the land purchased for park purposes. In no event, nor under any circumstances, is the city liable, except as a trustee, to pay over to the certificate holder the amount actually realized from the assessments. The debt limit is measured by the assessed valuation of the taxable property of the city. How, then, can it be said that these certificates, for the payment of which the city is not liable, and for which no tax can be levied, are an indebtedness of the city, within the meaning of the statute fixing the debt limit?

3. Is the amount of the bonds and cash in the sinking fund of the city to be deducted from the total amount of its outstanding bonds for the purpose of determining whether or not it has exceeded its debt limit? The view which we take of the purpose and nature of this sinking fund renders unnecessary a decision of the question raised and discussed by counsel as to the repeal, by chapter 204, Laws 1893, of the provisions of the charter of the city authorizing such deduction to be made. If this statute does not prohibit such deduction, we are of the opinion that it must be made. It is claimed by plaintiffs that the proviso of section 2, c. 204, Laws 1893, under the rule, "*Expressio unius est exclusio alterius*," forbids the deduction of the amount of the sinking fund. This maxim is not of universal application in the construction of statutes, but whether or not it applies in a given case depends upon the intention of the legislature as indicated upon the face of the statute. *Broom, Leg. Max. 663; Suth. St. Const. § 329.* The proviso in question is in these words: "Provided that when bonds are issued for the purchase, refunding, or payment of other bonds of such city, the bonds to be so purchased or paid shall not be considered a part of the bonds on which any city may be liable for the purpose of determining whether the bonds so issued will increase the bonded indebtedness of any city above the limit prescribed in this act." The purpose of this proviso is obvious upon its face. It was intended to set at rest any possible question which might be raised by would-be purchasers of bonds issued for the purpose of purchasing, paying or refunding previous bonds of the city, as to their validity, which would impair their market value, and embarrass their negotiation. When this proviso is read in connection with the other provisions of the chapter of which it is a part, especially the first section thereof, which declares that the rights and powers previously granted to the cities of the state shall not be abridged or affected by the act, it is manifest that the proviso was not intended either to prohibit or to authorize the taking into account the sinking fund of a city in determining its actual indebtedness. We are then, to inquire as to the essential character of this sinking fund, and determine therefrom, according to general prin-

ciples of law and the suggestions of common sense, whether or not the amount thereof should be deducted from the total amount of the outstanding funds of the city in order to ascertain its actual indebtedness. Section 13, c. 5, Charter of Minneapolis, requires the city council to make an annual levy of taxes sufficient to pay interest to become due during the next fiscal year on all bonds and debts of the city, and also to levy a further tax of one mill to pay the principal of the bonds when they become due, and forbids the application of the fund created by such tax to any other purpose. Section 14, Id., declares that, in order to provide for the certain payment of the bonds and debts of the city, the council are authorized to maintain this sinking fund, and provide for its investment and security, but have no authority to abolish it until all the debts of the city are paid, nor to divert it or any increase thereof to any other purpose, and are required to appoint a board of sinking fund commissioners to take charge of the fund. This board, with the consent of the council, may invest the fund in the bonds of the city or in certain other designated bonds. If it is invested in the bonds of the city, they are not to be canceled, but the interest thereon is to be collected, and added to the fund; and when the principal of any city bonds becomes due, such of the bonds in the sinking fund as may be necessary are to be sold, with the consent of the council, and the matured bonds paid. In case the board or council neglect or violate any of these provisions, any taxpayer or bondholder is given the right to enforce compliance therewith by suit. The substantial maintenance of this fund, in accordance with these provisions, to secure payment of the principal and interest of the bonds and debts of the city, is declared to be a part of the contract with the bondholders. Section 22, Id., declares, in effect, that no warrant or further appropriation on the part of the city council is required for the application of the money in the sinking fund to the payment of the bonds. It is clear from these provisions that the money in the sinking fund which has already been raised by taxation is irrevocably appropriated to the payment of the outstanding bonds and debts of the city. If any part of the fund is invested in city bonds, they can never be disposed of, except to extinguish by payment prior maturing city bonds. When any bonds held by the sinking fund become due, they are at once a charge against the fund, and they are extinguished by crediting the amount thereof to the fund. It is true, as counsel for plaintiffs claim, that there is no express provision in the charter providing that city bonds in the sinking fund, when they mature, shall be so extinguished; but such bonds can only be sold to pay other bonds as they become due, and the provision of the charter authorizing such sale surely cannot mean that city bonds in

the sinking fund already due are to be sold to pay other bonds also due, or that city bonds purchased for the fund are to remain uncanceled indefinitely after their maturity, and a tax equal to the interest thereon levied annually, and paid into the fund. The fair inference from the law relating to this sinking fund is that, when bonds become due, they are to be paid and canceled, whether held by the sinking fund or other parties. It appears from the record in this case that all of the bonds held by the sinking fund are the bonds of the city, hence the amount of the bonds and the money in the fund necessarily represent an equal amount of the outstanding and uncanceled bonds and indebtedness of the city, which has already been realized from taxation to pay the bonds; and to ascertain the further amount to be raised by taxation in order to extinguish the entire indebtedness of the city it necessarily follows that the amount of the sinking fund is to be deducted from the entire amount of the apparent indebtedness of the city. The balance is its actual debt. The debt limit of the statute has reference to an actual indebtedness for the payment of which a tax must be levied, not to an uncanceled apparent liability. *Bank v. Grace*, 102 N. Y. 313, 7 N. E. 164. As we have suggested, this debt limit of the statute is measured by the rate per cent. of taxation necessary to pay the entire debt of the city. This is the test. Now, it is apparent from the admitted facts in this case, that a 5 per centum tax on the assessed valuation of the city would produce a sum which, if added to the amount of the sinking fund, would exceed the amount of all of its bonds and debts, including these reservoir bonds. It follows, then, that the amount of the sinking fund must be deducted from the total apparent debt of the city to ascertain whether its actual debt exceeds the debt limit.

4. Can the board of sinking fund commissioners purchase from the city its bonds at the time they are offered for sale? We answer this question in the negative. We agree with the city attorney that there is no statute forbidding in express words such purchase, but we are of the opinion that such a purchase is so radically inconsistent with the essential character of the sinking fund, and so destructive of the purposes to be conserved by its maintenance, that it must be held that the prohibition is necessarily implied. The city can only issue and sell its bonds by the action of its council, and the board of sinking fund commissioners can only buy its bonds by the action and consent of the council. The intention of the statute is that the council and the board shall be a check upon each other in the purchase of bonds with money in the sinking fund. The unbiased judgment and independent action of each body are essential to the safe guarding of a fund which is intended to secure the certain payment of the existing bonds and

debts of the city, and which the council are forbidden to divert to any other purpose. The council cannot act for the city in selling its bonds, and at the same time consent that the trustees of the bondholders and creditors of the city, the board, may invest the trust fund in the bonds which the council desire to sell, because in such a case there can be no exercise of an unbiased and independent judgment by the council as to the propriety of such purchase by the board. To construe the law so as to authorize such a sale would make the sinking fund a debt-creating instead of a debt-paying scheme. Section 4, c. 204, Laws 1893, provides that the bonds to be issued under the act shall not bear interest at a greater rate than 5 per cent. per annum, and that they shall not be sold for less than par and accrued interest to the highest bidder, after publication of notice of the sale thereof. This implies that, if the credit of a municipality or the money market is such that its bonds will not bring in the open market par and accrued interest, they shall not be sold. Now, if a city having a sinking fund set apart for the payment of its outstanding bonds can be a bidder and purchaser of its own bonds at the original sale thereof, using the sinking fund for such purpose, it follows that, when the credit of the city or the money market is such that a 5 per cent. bond will not sell in the market for par and accrued interest, the city may sell its bonds to itself by the action of its council and its sinking fund board, in violation of the spirit, if not the letter, of the law. Or, in other words, the city council, when it cannot sell bonds of the city in the manner required by law, may consent that the board may turn over to the city the mon-

ey in the sinking fund, and receive in lieu thereof a new issue of city bonds that cannot be sold in the market, whereby the sinking fund is diverted, to the prejudice of bondholders and the impairment of the credit of the city. One of the primary objects of the law in providing for and jealously guarding the sinking fund is to maintain the credit of the city, and enable it to borrow money, when necessary, on its bonds, at a low rate of interest, and thereby lessen the burden of the taxpayers. But if the city, by the consent of its council and the action of its board of sinking fund commissioners, can help itself to the money in the fund when its bonds are unsalable, and substitute for the money such bonds, the object of the law will be defeated, and the sinking fund become the means of facilitating an increase of the debt of the city. True, there is no claim made in this case of any want of good faith on the part of the council and the board, and it may also be true that in this particular case it would be for the advantage of the sinking fund to purchase of the city its bonds direct, before they have been negotiated; but the evils which might result from a construction of the statute permitting this to be done are serious. The purpose of the statute is to guard against the possibility of such evils. When the provision of the charter relating to the sinking fund and the statute regulating the sale of municipal bonds are considered together, it is obvious that a sale by the city of its bonds to itself for its sinking fund would be a violation of the spirit, if not the letter, of the law.

Order reversed, and case remanded with direction to the district court to grant the plaintiffs' motion for a temporary injunction.

LEWIS v. WIDBER, Treasurer. (No. 15,452.)

(33 Pac. 1128, 99 Cal. 412.)

Supreme Court of California. Aug. 30, 1893.

In bank.

Application by George E. Lewis for a writ of mandate to compel J. H. Widber, treasurer of the city and county of San Francisco, to pay an audited claim of applicant for salary as chief clerk in the office of registrar of voters. Granted.

S. C. Denson, for petitioner. T. C. Van Ness, for respondent.

McFARLAND, J. This is an original application here for a writ of mandate requiring the respondent, who is treasurer of the city and county of San Francisco, to pay an audited claim of petitioner for his salary as chief clerk in the office of registrar of voters for the month of June, 1893. The facts are that the office of petitioner was established, and his salary fixed at \$150 per month, by a statute of the state legislature; that when on August 3, 1893, he made demand on the respondent for the payment of his claim for salary for the month of June preceding, there was plenty of money in the general fund of said city and county to pay the same, but that there was no money in said fund which had been derived from the revenues of the city for the fiscal year ending June 30, 1893. The charter of said city and county, commonly called the "Consolidation Act," provides that the fixed salaries of officers shall be paid out of the general fund, and that, in case of a deficiency in the fund, demands for salaries shall be registered and paid out of any moneys afterwards coming into the fund. Sections 95, 96. It nowhere limits the payment of such salaries to the revenue of any particular year. The respondent contends—or, rather, he suggests that somebody else might give him trouble by contending—that he should not pay petitioner's salary on account of section 18 of article 11 of the state constitution, which reads as follows: "No county, city, town, township, board of education, or school district, shall incur any indebtedness or liability in any manner, or for any purpose, exceeding in any year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified voters," etc. It is quite apparent, however, that this clause of the constitution refers only to an indebtedness or liability which one of the municipal bodies mentioned has itself incurred; that is, an indebtedness which the municipality has contracted, or a liability resulting, in whole or in part, from some act or conduct of such municipality. Such is the plain meaning of the language used. The clear intent expressed in the said clause was to limit and restrict the power of the municipality as to any indebtedness or liability which it has discretion

to incur, or not to incur. But the stated salary of a public officer, fixed by statute, is a matter over which the municipality has no control, and with respect to which it has no discretion, and the payment of his salary is a liability established by the legislature at the date of the creation of the office. It therefore is not an indebtedness or liability incurred by the municipality, within the meaning of said clause of the constitution. Counsel for respondent does not very strenuously contend that the foregoing construction would not be the correct one if the question were *res integra*; but he contends that this court has decided otherwise in the cases of *Gas Co. v. Brickwedel*, 62 Cal. 641; *Shaw v. Statler*, 74 Cal. 258, 15 Pac. Rep. 833; and *Schwartz v. Wilson*, 75 Cal. 502, 17 Pac. Rep. 449. But the point under discussion here was not involved in either of those cases, and therefore could not possibly have been there decided. In neither of those cases was the subject of the litigation the payment of the fixed salary of a public officer prescribed by law. In each case there was involved only an ordinary debt created by the municipality itself,—an indebtedness which it had incurred; and we agree with the decision of the court in those cases that debts and liabilities of that kind must be paid out of the revenue of the year in which such indebtedness or liability was incurred by the municipality. In the *Brickwedel* Case the matter involved grew out of a contract made by the city about the purchase of gas; in *Shaw v. Statler*, out of the hiring of a man as boss of the chain gang; and, in *Schwartz v. Wilson*, out of a sale to the county of certain goods, wares, and merchandise. Those cases were therefore properly decided; but, of course, general language used by a judge when delivering the opinion of the court must be considered with reference to points before the court, and the matters involved in the case. And the general language used by Mr Justice Ross in the *Brickwedel* Case,—upon which the fears of respondent are based,—even if taken in the abstract, does not warrant the construction put upon it. The words, "no such indebtedness or liability should be incurred exceeding," etc., means incurred by the municipality; and in speaking of the object of the provision he refers to a system previously prevailing in some of the municipalities, "by which liability and indebtedness were incurred by them far in excess," etc. And in speaking of the result of the enforcement of the constitutional provision, after referring to the principle that all are presumed to know the powers of a municipality, he says that "those who contract with it, or furnish it with supplies, do so with reference to the law." And, of course, when taken with reference to the point then before the court, there is nothing in the opinion which conflicts with the conclusion at which we have arrived in the case at bar. The cases cited

by respondent, of *People v. May*, 12 Pac. Rep. 838, decided by the supreme court of Colorado, and *Lake Co. v. Rollins*, 130 U. S. 662, 9 Sup. Ct. Rep. 651, are not in point. Those cases dealt with a constitutional provision very different from the one invoked in the case at bar,—a provision which limited the amount of “debt by loan” which a county could contract, and the “aggregate amount of indebtedness” which it could incur. On the other hand, the cases of *Cashin v. Dunn*, 58 Cal. 581, and *Welch v. Strother*, 74 Cal. 413, 16 Pac. Rep. 22, are strongly in point, for while the “one-twelfth act,” and not the said constitutional provision, was involved in those cases, still the same rule was applied there which we apply here. In the former case the court said that the said act “has no application whatever to the auditing and payment of demands for salaries of officers whose appointment is provided for and salaries fixed by law,” and in the latter case this court said as follows: “Salaries are not liabilities against the treasury, which rest upon any authorization or contract by the board of supervisors, or any oth-

er officer. They are fixed by law, and are not subject to the control of such officers. They are payable out of the general fund, and are not limited to any particular part of that fund which the board may choose to set apart for their payment.” Our conclusion is that the payment of the salary of a public officer, whose office has been created and salary fixed by law, either statutory or constitutional, is not within the provision of said section 18 of article 11 of the constitution; that his salary is to be paid out of said general fund when there is sufficient money therein, without regard to revenues of separate years; and that it was a duty specially enjoined by law upon respondent to pay the said audited demand of petitioner when it was presented, on said 3d day of July. Let a peremptory writ of mandate issue, as prayed for in the petition.

We concur: FITZGERALD, J.; GAROUTTE, J.; DE HAVEN, J.; HARRISON, J.

BEATTY, C. J., did not participate in the decision of the above cause.

FINLAYSON v. VAUGHN, County Treasurer.
(56 N. W. 49, 54 Minn. 331.)

Supreme Court of Minnesota. July 31, 1893.

Appeal from district court, Ramsey county; Brill, Judge.

Action by David M. Finlayson against John D. Vaughn, treasurer of Pine county. Defendant had judgment, and plaintiff appeals. Affirmed.

C. D. & Thos. D. O'Brien, for appellant. Robert C. Saunders, for respondent.

VANDEBURGH, J. The township of Hinckley, in the county of Pine, in the year 1886 issued certain bonds in aid of the Kettle River Railroad Company. These bonds, \$12,000 in amount, were issued in pursuance of chapter 106, Laws 1877, as amended in 1878, chapters 45, 46; and all the proceedings leading to the issuance thereof are found by the court to have been regular, and in conformity with the statute. It is, however, insisted by the plaintiff that the amount issued, together with the coupons, was in excess of 5 per cent. of the assessed valuation of the property of the town. Conceding that the plaintiff is right in this, it does not follow, as respondent suggests, that the entire indebtedness is void, but the invalidity would attach only to the excess over the statutory limit. But it does not appear that the entire indebtedness exceeds such limit. The amount of the bonds voted is \$12,000, issued October 1, 1886. These bonds bear interest at the rate of 7 per cent. per annum, and run 30 years, each bond having corresponding interest coupons attached, payable on October 1st each year, the first being due and payable October 1, 1887. It is also admitted that the total assessed valuation of the taxable property of the town for that year was \$251,359. If the principal alone is considered, it is obvious that the total amount of the bonds was within the 5 per cent. limit. But the plaintiff claims that the interest, which, by the terms of the bonds, was to accrue from year to year after the date thereof, must be included in the amount allowed to be issued under the statute. This is clearly erroneous, as the court

below held. These interest coupons form no part of the principal debt, and the bonds when issued represented at that date an indebtedness for the principal sum only. The statute contemplates nothing more. *Durant v. Iowa Co.*, Woolw. 71, Fed. Cas. No. 4,189.

2. The proposition for the issuance of the bonds was in the form required by the statute, and contained a statement that "said railroad company would, in consideration of said bonds, at the election of said town, issue to said town one hundred and twenty shares of its capital stock of the par value of \$100 per share, and would deposit the certificates of such shares to be delivered to the proper authorities of said town upon the delivery of said bonds to said company." It is also found that the board of supervisors of the town, after the election authorizing the issuance of the bonds, deeming it for the interest of said town to do so, at a meeting duly held on September 29, 1886, waived the issuance by said railroad company of any stock to said town. On October 1, 1886, the bonds were issued and deposited in escrow to be delivered to the railroad company, which was done prior to January 1st following, but no stock was issued to the town. The plaintiff's contention is that the town supervisors had no authority to waive the issue of the stock, but the statute is a complete answer to this objection. Section 4 provides that the proposition to be voted on shall contain a statement that the railroad company will, at the election of such municipality, issue to it such number of the shares of the capital stock as will at par value correspond with the principal sum of such bonds; and the last proviso in section 5 authorizes the board of supervisors of any such town, in case they shall deem it best for the interest of such town to do so, to waive the issuance of any such stock. It is evident that in some cases the stock would not be of sufficient value to compensate for the risk of the liability of stockholders. In any event, it is left with the supervisors to determine, and their waiver in this instance in no way affects the validity of the bonds. Judgment affirmed.

RUTLAND ELECTRIC LIGHT CO. v. MARBLE CITY ELECTRIC LIGHT CO.

(26 Atl. 635, 65 Vt. 377.)

Supreme Court of Vermont. Rutland. April 22, 1893.

Appeal from chancery court, Rutland county; Taft, Chancellor.

Bill by the Rutland Electric Light Company against the Marble City Electric Light Company for damages and an injunction. The bill was dismissed pro forma, and the orator appeals. Reversed.

Geo. E. Lawrence and C. H. Joyce, for orator. J. C. Baker, for defendant.

TYLER, J. The orator and defendant are rival corporations, organized under the general laws of this state for the purpose of carrying on, respectively, the business of electric lighting in the village of Rutland. In May, 1886, the orator entered into a written contract with the trustees of the village for lighting the village streets, and, acting upon and in compliance with that contract, it established a plant, erected poles, strung wires, and commenced doing business. It was stipulated that, where wires crossed streets, they should not be within 30 feet of the ground, and street line wires should be at least 20 feet above the ground. The poles were erected at points indicated by the trustees. Some three years later the defendant, by permission of the trustees, erected poles, strung wires, and commenced the business of electric lighting in competition with the orator. Its poles were also placed under direction of the trustees. In some of the principal streets the poles were set on the same side as the orator's poles, and quite near to them. The orator employs a system for lighting buildings with incandescent lamps with a current of electricity used on its wires of only 110 volts, which is so low a current that the wires, when charged, can be handled with safety. The defendant uses for its incandescent lamps an alternating current of 1,000 volts on its wires on the streets. By means of what are called "converters," a current of 50 volts is taken into buildings. When the defendant's wires were first strung upon the poles they did not touch the wires and poles of the orator, but from the effect of storms, from stretching, or some other cause, they now sometimes come in contact with the orator's poles and wires, and injure them. The wires should not be nearer each other than 12 inches, and the crosspieces upon which they are strung should be at least 2 feet apart, so that when the wires are loaded with snow and ice, or when swayed by the wind, they will not come in contact. When a wire carrying a heavy current comes in contact with one carrying a lighter current the heavy current is liable to be inducted into the other wire, which endangers the orator's wires, lamps, and plant, and is liable to set fire to buildings, for which the orator would be an-

swerable in damages. The defendant's poles are not as high as those of the orator. The crosspieces to which its wires are attached are nearer the ground than those of the orator, so that in places the defendant's wires are under the orator's, which renders it difficult and dangerous for the orator's employes to reach their wires for repairs and other purposes. No accident has thus far happened. The defendant's wires are not usually charged with electricity in the daytime, but the two plants are entirely independent of each other, and the orator's employes have no means of knowing when the defendant's wires are charged. Where the wires of the parties cross Centre street the orator's is only 21 feet above the ground; the defendant's is strung above it, and, having sagged, rests upon it. At other places, where the respective wires enter buildings, they interfere with each other. These are the material facts found by the master. It is conceded that the village trustees had authority to make the contract with the orator.

The defendant virtually concedes that the orator's contract with the trustees is the measure of its rights. The village, by its trustees, invested the orator with certain rights, and, after the orator, relying upon the contract, had expended money in establishing its plant and appliances, the village could not, by an ordinance, have infringed these rights; and clearly it could not confer upon the defendant authority to infringe them. On the other hand, it is not claimed that the orator obtained a privilege of the streets to the exclusion of the defendant, but that the defendant's rights were subordinate to the orator's, and must be exercised in such a manner as not to interfere with them. If authorities were required to sustain so plain a proposition, those cited upon the orator's brief are pertinent. In *Hudson Tel. Co. v. Jersey City*, 49 N. J. Law, 303, 8 Atl. 123, it was held that where the city, by an ordinance, under statutory authority, had designated certain public streets in which the company might place its telegraph poles, and the company had expended money in placing its poles upon such streets, the city could not, by subsequent ordinances, revoke such designations; that the company had an irrevocable vested right to use the streets for the designated purpose. *Thompson's Law of Electricity* lays down the general rule that when a municipal corporation, under a statutory provision, has, by ordinance or other lawful mode, authorized a telephone company to erect its posts or poles in certain designated streets, and the company proceeds so to erect them, and to expend money on the faith of the license so granted, it thereby acquires a vested right to the use of the designated streets, so long as it conforms to the conditions of the license; and the license cannot thereafter be revoked by the municipality. So an ordinance authorizing a telephone company to maintain lines on its streets, without limita-

tion as to time, for a stipulated consideration, when accepted and acted upon by the grantee, by a compliance with its conditions, becomes a contract, which the city cannot abolish or alter, without consent of the grantees. It appears that the orator has suffered some damage in consequence of its wires coming in contact with the defendant's; that it is constantly exposed to danger from such contact, and that its men cannot conveniently and without danger reach its wires for the

purpose of making repairs and of connecting lines therewith to buildings. We therefore think that the orator is entitled to relief according to the prayer of the bill. The pro forma decree dismissing the bill is reversed, and the cause remanded. An accounting is ordered for the damages already suffered by the orator, and the orator may have a perpetual injunction restraining the defendant from maintaining its wires so as to interfere with those of the orator.

✓ CITY OF BRENHAM v. BRENHAM WATER CO.

(4 S. W. 143, 67 Tex. 542.)

Supreme Court of Texas. March 25, 1887.

Appeal from district court, Washington county.

Tarver & Bryan and J. T. Swearingen, for appellant. Garrett, Searcy & Bryan and Bassett, Muse & Muse, for appellee.

STAYTON, J. On August 18, 1884, the city of Brenham passed an ordinance, which provided that an association of persons, then unincorporated, known as "Brenham Water Company," should have the right to establish, construct, and operate a system of water-works in or adjacent to the city, and for this purpose to use all the streets, alleys, lanes, public grounds, and all places under the control of the city, so far as might be necessary for the proper conduct of the business, "and for supplying said city, and the inhabitants thereof, with fresh water for domestic, manufacturing, fire, and other purposes." The length of mains and pipes to be first established was fixed at not less than four miles, to be located as might be agreed between the company and the city, which were required to be extended as the city might order to be done. The seventh section of the ordinance determined the capacity the water-works were required to have, and the eighth section gave the city the right to use water for public purposes other than the extinguishment of fires which the city was to receive in full payment for all municipal taxes during the full term for which the contract was to run. The ninth section reserved to the city the right to purchase the water-works after the expiration of 10 years, at such price as might be agreed upon by persons to be selected as therein provided, whose appraisal was to be binding upon both parties. Section 1 was: "That there is hereby given and granted to Brenham Water Company the right and privilege, for the term of twenty-five years from the date of the adoption of this ordinance, of supplying the city of Brenham, and the inhabitants thereof, with water for domestic or other uses, and for the extinguishment of fires." The fifth section is as follows: "The said city of Brenham hereby agrees to rent, and does rent, of the said Brenham Water Company, 35 double-nozzle fire hydrants, located, by authority of said city, upon the mains and pipes within said city, for the extinguishment of fires, at a rental of \$3,000 per annum, payable quarterly on the first day of January, April, July, and October in each year. The said rental shall commence when the city is notified that the said hydrants are ready for use, and shall continue during the full term specified in this ordinance; and for the purpose of providing for the payment of all hydrant rental becoming due, under the provisions of this contract,

the city council shall levy, collect, and appropriate annually a sufficient sum of money to cover the amount becoming due on this contract." The sixth section provided that "the said Brenham Water Company shall make all extensions of mains and pipes whenever the said city council shall order the same to be made, and shall erect not less than at the rate of ten double-nozzle fire hydrants to the mile on such extensions, for which hydrants the said city of Brenham shall pay a rental of \$60 each per annum, payable as provided in section 5." The thirteenth section fixed the water rate which might be charged to inhabitants in most of the matters and business that could be enumerated, but as to some enumerated, and those not enumerated, the charge was left to be fixed by contract to be made with the superintendent, and all rates were made payable quarterly in advance at the office of the corporation. The fourteenth section provides that "this ordinance shall be a contract by and between the city of Brenham and the Brenham Water Company, their successors and assigns, and shall be binding on both parties thereto, provided said company shall file with the city clerk its acceptance of the same in writing within five days after the passage of the same." The water company's acceptance was filed as required by the ordinance.

Before the first of June, 1885, the persons composing the Brenham Water Company incorporated under the same name, under the general incorporation act, and on that day the city was notified that the works were ready for use; but it was found that the water supply was not sufficient; wherefore the water company asked the acceptance of the works by the city, agreeing to give an additional supply of water equal to that they were then able to furnish, and to increase it as the consumption demanded it; to keep on hand such fuel as would enable it at all times to speedily put the pumps in motion in case of fire; to keep and maintain a telephone; to pump the stand-pipes full every day, and to bank the fires under the boilers; to allow the fire department to fill the fire cisterns from any of the hydrants; and "to adopt and enforce strict rules and regulations for the faithful carrying out of the purposes for which it is intended, and to use every diligence to give the city of Brenham good and efficient fire service." The city, on the same day, accepted the water-works under the terms of the agreements then tendered; and, in its ordinance so accepting, it provided "that no payment shall be made on said contract if the said company does not comply with its agreement hereinbefore recited, but, on compliance therewith, the payments shall be made, commencing on the first day of June, 1885." The ordinances did not give to the city the power to regulate and control the water-works, and to make them effective in case the water company failed to do so.

This action was brought to recover the

price stipulated for the use of hydrants for the time intervening June 1, 1885, and January 1, 1886. The ordinance was made a part of the petition.

The city filed defenses, thus summarized, in the brief of its counsel, correctly:

"(1) A general demurrer.

"(2) That it appeared from the petition that the contract sued upon created a monopoly and perpetuity in plaintiff.

"(3) By special exception that no authority to make said contract was therein alleged.

"(4) That it appeared from said petition that the city council had rented the hydrants for a period of twenty-five years, at the yearly rental of three thousand dollars, and no authority was alleged in the council to bind the city for such a period of time.

"(5) A general denial.

"(6 and 7) That said contract was inoperative, against public policy, and void, because—First, the city of Brenham, having less than ten thousand inhabitants, was prohibited by the constitution and laws of the state from levying for city purposes more than twenty-five cents on the one hundred dollars valuation, on the property subject to taxation, and at the date of said contract the current expenses of the city, including salaries of officers and other reasonable and necessary expenses, annually incurred, exceeded the revenue derived from said tax; that there was no excess in any fund which could be appropriated to the payment of the rent of said hydrant, and the council, having no means to pay said rent, and having exhausted the limit of taxation allowed by law, were not authorized to contract said debt; that at the date of the contract the entire available current revenue of the city, out of which the expenses incurred by said contract could be paid, amounted to the sum of \$8,763.31, an itemized statement of which is given, while the current expenses amounted to the sum of \$12,942.14, an itemized statement of which is given; that these expenses, exceeding all the available revenues of the city, rendered the contract inoperative, illegal, and void.

"(8 and 9) That the contract was an attempt on the part of the council to surrender its legislative discretion, and barter away the power conferred upon it by law, and was contrary to public policy.

"(10) That the contract, under the pretense of obtaining water for the city, was in truth and in fact a donation.

"(11) That the price stipulated was so extortionate, unreasonable, and oppressive as to render said ordinance void.

"(12) That said contract exempted the property of plaintiff from the payment of city taxes during the term of twenty-five years, and was in violation of law which prohibits the council from appropriating the school tax and other special taxes to any fund other than that for which it was levied, and was therefore illegal.

"(13) The defendant specially denied that

plaintiff complied with its undertakings, in consideration of which the promises of the defendant were made, particularly in reference to the quantity or supply of water to be obtained, and quality of the pipes and mains furnished by the company.

"(14) That for these reasons, among others, the council, on the tenth day of July, 1885, adopted an ordinance rescinding the contract with the Brenham Water Company, made August 18, 1884, and the supplemental contract made June 1, 1885, and repealing certain sections of the said ordinance entitled 'An ordinance to provide a system of water-works for the city of Brenham,' etc. The sections of said ordinance so repealed were all sections which required the water company to furnish water to the city for any purpose, or authorized the payment of plaintiff therefor in the amount claimed in the suit; that the sections in the ordinance excepted in said repealing ordinance were the sections which gave the plaintiff the right and privilege of supplying water, and the provisions therein for the enjoyment and protection thereof; that this ordinance of July 10th is a bar to plaintiff's action.

"(15) That, at the date of the contract, there was no such corporate body in existence as the Brenham Water Company; that the pretended existence of such a contract at the date of said contract was false and fraudulent.

"(16) That the said company, through its agents, falsely represented to and assured the council, as an inducement to the contract, that the system of water-works would secure a general reduction in premiums paid for insurance, and that the amount saved in this way would be greater than the amount expended for water, and that, instead of such reduction, the rates had been increased.

"(17) That the supplementary contract of June 1st was made by the council while acting under a mistake of existing facts, and was obtained through the false representations of W. C. Conner, an agent of plaintiff; that the council was not afforded any opportunity of inspecting the mains and pipes then under ground, and inaccessible, and in the possession of plaintiff, and the defects were of such a character as to render it impossible to discover them by any means available to the council, and that Conner represented that they were sufficient in every respect for the purposes designated, and that the council was misled by the fraudulent defects in said mains and pipes; that, by reason of his false statements and misrepresentations, the alleged ordinance of acceptance was fraudulent."

The court sustained demurrers to so much of the answer as alleged that the contract created a debt in excess of the sum the city was authorized to raise by taxation, and to so much as set up the ordinance of July 10, 1885, rescinding the contract on which this action is based, and overruled the defend-

ant's demurrers to plaintiff's pleadings. The evidence introduced under the thirteenth, sixteenth, and seventeenth paragraphs of the defendant's answer was conflicting. There was a verdict and judgment for the plaintiff.

(1) The first assignment of error is that "the court erred in overruling defendant's demurrer alleging, as objections to plaintiff's original and supplemental petitions—First, that the contract sued upon created a monopoly and perpetuity; second, that no authority was shown in the city council making the contract to bind the city for a period of twenty-five years, and the attempt to do so was invalid, because the council could not to that extent surrender its legislative discretion and barter away the authority reposed in it by law; third, because the contract was an attempt upon the part of the council to limit the legislative authority of their successors, and embarrass them in the exercise of their exclusive discretion."

The city of Brenham was incorporated under a special law approved February 4, 1873, and the first section of its charter declares that it shall "be capable of contracting and being contracted with." Section 5 of article 24 of the charter gives the city power "to provide the city with water; to make, regulate, and establish wells, pumps, and cisterns, hydrants, and reservoirs, in the streets or elsewhere, within said city, or beyond the limits thereof, for the extinguishment of fires, and the convenience of the inhabitants, and to prevent the unnecessary waste of water." These are the only parts of the charter which have any bearing on the questions raised by the assignments.

The law under which the Brenham Water Company was incorporated provides that "any gas or water corporation shall have full power to manufacture, and to sell and to furnish, such quantities of water or gas as may be required by the city, town, or village where located, for public or private buildings, or for other purposes; and such corporation shall have power to lay pipes, mains, and conductors for conducting gas or water through the streets, alleys, lanes, and squares in such city, town, or village, with the consent of the municipal authorities thereof, and under such regulations as they may prescribe." Rev. St. 1879, art. 629. "The municipal authorities of any city, town, or village, in which any gas-light or water corporation shall exist, are hereby authorized to contract with any such corporation for the lighting or supplying with water the streets, alleys, lots, squares, and public places in any such city, town, or village." Id. art. 630. All these laws may be looked to in determining the power of the city to make the contract involved in this case, though, did it depend solely on the ordinance of August 18, 1884, and its acceptance, articles 629 and 630 of the Revised Statutes of 1879 would not, in terms, be applicable.

Taking all the laws into consideration, we

cannot doubt the power of the city to make some contract through which the city might be furnished with water. It becomes necessary, for the proper determination of this case, to ascertain the character of the contract on which the rights of the parties depend. The subject-matter of the contract is one over which the city had control solely under the power confided to it as a municipal government, to be exercised for the public good, and not under any private corporate right or proprietorship. The first section of the ordinance professes to give and to grant a right and a privilege to the water company to supply the city and its inhabitants with water for the period of 25 years. Was it intended to make this right and privilege exclusive for that period of time? This must be ascertained from the language of the ordinance, surroundings of the parties, and purpose sought to be accomplished. The ordinance, in terms, professes to give and to grant a right to do certain things, and therefore to receive certain benefits, for a quarter of a century; i. e., to confer a claim to do certain things, and to receive a fixed compensation, which may be enforced for that period. It not only professes, in general terms, to confer such a right, but as if to emphasize it, and to fully illustrate the character of right intended to be granted, it terms it a "privilege." The word "privilege," as used in the ordinance, is evidently not used in the technical sense in which it is used in the civil law, or even under the common law, when used in the sense of "priority," but was intended to be given its ordinary signification,—meaning a right peculiar to the person on whom conferred, not to be exercised by another or others. This right is to supply the city and its inhabitants with water for their varied uses, for 25 years, at fixed prices in enumerated cases, and at such prices as the water company and inhabitants may agree upon in other cases. The word "supplying" must be considered in its connection, with a view to ascertain whether it was used in its primary sense, or in one more restricted; and, so considered, we can have no doubt that it was used in its primary sense, intending thereby to give the water company the right and privilege to furnish to the city and its inhabitants what water might be needed or necessary to be furnished through such a system. In the ordinance under consideration, it can mean no less than to furnish all the water the city and its inhabitants may need to have furnished under the power given to the city, through its charter, and this for the period of 25 years. It would do violence to the context to give to the word any other meaning.

If nothing more appeared than we have considered, to give character to the contract, and to illustrate the nature of the right intended to be secured through it, it seems to us that there is no escape from the conclusion that the parties contracted, and intended to contract,

that the right of the water company should be exclusive. The fifth and sixth sections of the ordinance, however, if there were doubt, it seems to us would remove it. The water company obligated itself to erect and maintain a given number of fire hydrants on the mains, which it absolutely agreed to put down, and for the use of these the city agreed to pay the sum of \$3,000 per year for the period named. It further obligated itself to extend its mains, if requested to do so by the city, and upon each mile of such extension to erect not less than 10 fire hydrants, for each one of which the city promised to pay a rental of \$60 per annum, as provided in the fifth section. Was the city, in this and in another part of the ordinance to which we have referred, agreeing to receive, and the company to furnish, the entire quantity of water to be used for fire and other enumerated public purposes during the 25 years? The contract, in terms, obligated the city to pay for this for the full period, whether it used the water or not, and thus made the only right valuable to the water company in so far exclusive.

If the city refused to take the water, and obtained it elsewhere, if the contract was valid, and the parties are to be supposed to have so considered it, then the city would but assume a double burden, which it cannot be conceived that the city ever contemplated. The language of the contract, the surroundings of the parties, and their evident purpose, forbid the belief that they either intended to make the right and privileges of the water company other than an exclusive right to furnish and be paid for all the water the city and its inhabitants might need to have furnished through a system of water-works for the full period of 25 years. Does the charter of the city of Brenham, or that of the water company, confer upon the city the power to make such a contract? Both charters may be considered together. The charter of the city doubtless gave it power to provide the city with water, and, under this, it may be held that it had the power to make a contract to receive and pay for water to be furnished by some other corporation or person. The charter of the water company expressly conferred upon it power to contract with the city to supply it with water for public purposes. Its charter, however, is under the general law, and the express power given to such corporations was evidently given to enable such of them as might be located in cities or towns having no such powers as had the city of Brenham to contract with them. The summary of powers which a municipal corporation has and may exercise, as given by Mr. Dillon, was recognized as correct in the case of *Williams v. Davidson*, 43 Tex. 33. "A municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those es-

sential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied." Dill. Mun. Corp. 89.

No express power is conferred upon the city, through either or both of the charters, to make a contract through which the water company could become entitled to the use of the streets, and to have the exclusive right to furnish the city and its inhabitants with water at a fixed rate for 25 years; and we do not see that power to make such a contract was necessary or essential to the proper exercise of the power expressly given. Under charters containing grants of power less full and express than are contained in the charter of the city of Brenham, it has been held that power existed to erect and operate water-works under the control and ownership of the municipality when it deemed it necessary to the public good. The legislature had given power to the city of Brenham to erect, control, and regulate water-works, and this it may exercise, if it has or may have the pecuniary ability, unless constrained by the contract under consideration. The legislature has also given power to every city within which one or more private corporations may have water-works to contract with one or all of them, and the further power to permit the use of its streets and other public grounds for the purposes of such works contemplated by the statute, by as many water companies as may desire to do so. Rev. St. 1879, arts. 629, 630, 3138.

It is now universally conceded that "powers are conferred on municipal corporations for public purposes; and, as their powers cannot be delegated, so they cannot be bargained or bartered away. Such corporations may make authorized contracts, but they have no power, as a party, to make contracts or pass by-laws which shall cede away, control, or embarrass their legislative or governmental powers, or which shall disable them from performing their public duties." Dill. Mun. Corp. 97. Whether and how a municipal government will exercise a discretionary power conferred upon it must necessarily depend upon the determination of that question by it, in the exercise of whatever legislative power has been conferred upon it. To secure the means to carry out such legislative determination, the making of one or many contracts may become necessary. The validity of every contract a municipal corporation may assume to make must, at last, depend upon the validity of the law or municipal ordinance under which it is made. If the legislature had expressly authorized the making of the contract under consideration, it would doubtless be binding, unless there be some constitutional objection to such a law,—a matter which will be considered hereafter,—and the ordinance could not be held to operate, con-

sidered with its acceptance as a contract, as a surrender of any power the legislature intended the city government to exercise at all times. The question would then have been determined by a power superior to that of the municipality,—a power from which it derives all the power it has, and even its existence as a corporation.

The city having been given such power as we have stated, it must be understood that it was intended, not only that it might use it, but that it should use it, if deemed necessary, for the public welfare, so long as the power is possessed by it, i. e., until taken away by the legislature. Will not the contract under consideration, if valid, have the effect, not only to embarrass the city government in the exercise of the power conferred upon it, but to withdraw from it the right to provide, in any other authorized way, water for public purposes and the use of its inhabitants, which was the sole purpose for which the power to erect, maintain, and regulate water-works was given to it? It seems so to us; for, as we have before said, the contract, in effect, assumes to give an exclusive right,—assumes to surrender to a private corporation, for the period of 25 years, the power which the legislature conferred on the municipal government. The power given to a municipal corporation to contract in relation to a given subject-matter does not carry the implication that it may contract, even with reference to that, so as to render it unable in the future to so control any municipal matter, over which it is given power to legislate, as may be deemed best. If the contract relied on is valid, neither the repeal of the charter of the city, nor any other act of the legislature, can abrogate it. If it is invalid, the city council had the right to declare it null, and to refuse to comply with it.

In the case of *Richmond Co. Gas-Light Co. v. Town of Middletown*, 59 N. Y. 231, the town authorities were empowered to cause the streets to be lighted with gas; and were required, when they deemed it necessary to do so, to contract with the gas company to furnish and lay down gas-pipes, erect lamp-posts, and other necessary things, and to furnish gas. Under these facts the authorities contracted with the gas company to furnish gas and light certain streets for the term of five years. Subsequently the law which conferred authority on the town to make the contract was repealed, and an action was brought to recover for gas furnished after the repeal, and it was held that the contract was invalid on the ground that such a contract could not deprive the legislature of its power to repeal a law affecting a municipal corporation. It was said: "If the board of town auditors could deprive the legislature of this power for five years, by entering into a contract with plaintiff for that time, it might for 100 years, by contracting for that period. I think it entirely

clear that no such power was conferred by the act on the town auditors."

A contract made with a municipal corporation is no more beyond its control, if its effect be to withdraw from or embarrass the municipality in the exercise of any legislative power conferred upon it, than is such a contract beyond the reach of the legislature that created the municipal corporation. It is solely the want of power to make the contract which authorizes either body to disregard it.

In the case of *State v. Cincinnati Gas-Light & Coke Co.*, 18 Ohio St. 291, it appeared that the gas company had a charter which empowered it, within the city of Cincinnati, to do all the acts which gas companies, incorporated under the general laws of this state, are authorized to do, including the right to sell gas to the city and its inhabitants. The city of Cincinnati was also authorized, by its charter, to contract with gas companies for lighting its streets, and to levy taxes to meet the expenses. So standing the charters, with the consent of the city the gas company acquired all the rights which the city had contracted to permit an individual to enjoy. That contract embraced substantially the same rights and privileges as the contract before us professes to give to the plaintiff, and these were to be enjoyed for 25 years. The contract was held to be invalid. Waiving a consideration whether the legislature of the state might have granted such rights and privileges, the court said: "Assuming that such a power may be exercised directly, we are not disposed to doubt that it may also be exercised indirectly, through the agency of a municipal corporation, clearly invested, for police purposes, with the necessary authority. But we have referred to these authorities as our justification for saying that when a franchise so far in restraint of trade, and so pregnant with public mischief and private hardship, is drawn in question, and it is claimed to be derived through a municipal ordinance or contract, the power of the municipal authorities to pass the ordinance or enter into the contract must be free from doubt. It must be found on the statute book in express terms, or arise from the terms of the statute by implication so direct and necessary as to render it equally clear."

In the case of *Garrison v. City of Chicago*, 7 Biss. 486, Fed. Cas. No. 5,255, it appeared that a gas company, having corporate powers as broad as any the plaintiff can claim under its charter, contracted with the city of Chicago to supply it with gas for the period of 10 years. The power of the city to buy gas, under its charter, was as full as is the power of the city of Brenham to contract for a water supply, and it was held that the city had no power to contract for so long a time. In disposing of the case it was said: "The officers of the city—the members of the council—are trustees of the

public. There can be no doubt that the right to regulate the lighting of the streets, and to furnish means for the same by taxation, is in its nature legislative power. It concerns the whole public of the city. The effect of the contract in question by the city authorities in October, 1869, if valid, was to bind their successors for 10 years as to these matters of legislation. If it be conceded that the power existed, as claimed, then it practically follows that, at the end of the term, in 1879, a contract may be made by their successors without limit, and which may bind the public indefinitely. I am unwilling to sanction a principle which, in a case like this, would lead to such results. The safer rule is to hold the officers of a municipality to a rigid accountability in the discharge of their trust. In all cases of contract to run for years, the authority to make them should be clear; because they involve pecuniary liability, and it is a tax upon future property owners of the city."

The principles asserted in the case of *Illinois & St. L. Railroad & Canal Co. v. St. Louis*, 2 Dill. 84, Fed. Cas. No. 7,007, lead to the same result.

In some of these cases there seems to have been no power given to the municipal corporations to do, through works to be created and controlled by themselves, the things for which they contracted with others. If so, the more potent is their illustration of the principle involved. The city of Brenham was not in that situation.

In the case of *City of Indianapolis v. Indianapolis Gas Co.*, 66 Ind. 400, it appeared that the gas company, by its charter, was empowered to manufacture gas to be used for the express purpose of lighting the city of Indianapolis. One section of its charter declared that "said company shall have the privilege of supplying the city of Indianapolis and its inhabitants with gas, for the purpose of affording light, for the term of twenty years." Another, "that nothing in this act shall be so construed as to grant to said Gas-Light & Coke Company the exclusive privilege of furnishing said city with gas, for the purposes within named." It was further provided that "the said city of Indianapolis, in its corporate capacity, shall have power to contract with said company to furnish gas for the purpose of lighting the streets, engine-houses, market-houses, or any public places or buildings." The gas company contracted to furnish the city with gas for the period of five years from a given date, and the city refused to pay for some received during the time embraced in the contract, and to recover the price of that the action was brought. It was held that the city was liable for gas furnished after it had elected to treat the contract as a nullity, and had given notice that it would not pay for gas furnished, and for lighting, cleaning, and repairing lamps on and after a day named. The provision in the charter that the act should not be construed to give an exclusive privilege to

the gas company was evidently not intended as a legislative declaration that the city might not by contract grant an exclusive privilege, but simply to avoid a misconstruction of the charter itself, and to leave the city free to make such contracts as it deemed proper, within the powers granted. The privilege given to supply the city and its inhabitants with gas for the period of 20 years, coupled with an express power to the city to contract, might well evidence an intention on the part of the legislature to permit it to contract for a longer period than was embraced in the contract made. If the legislature so willed, and there was no constitutional objection to such legislation, such a contract would be valid. From the report of the case, it is doubtful, however, whether the legislation to which we have referred controlled the decision. The gas company was chartered in 1851; the contract sued on was made July 22, 1876; and at some time after the incorporation of the gas company, whether before or after the contract was made not appearing from the opinion, the city was incorporated under a general law, one section of which gave the city power "to construct and establish gas-works, or to regulate the establishment thereof by individuals or companies, or to regulate the lighting of streets, public grounds and buildings, and to provide, by ordinance, what part, if any, of the expenses of lighting any street or alley shall be paid by the owners of lots fronting thereon." The inference from the opinion is that the power of the city to make the contract was based on the power given to regulate the lighting of the streets. If so, then the decision does hold that the city had power to make the contract, extending over several years, under a grant of power of the most general kind.

This case was cited as an authority to sustain a contract for a supply of water for a city embracing a period of 20 years. *City of Valparaiso v. Gardner*, 7 Am. & Eng. Corp. Cas. 629. The city of East St. Louis was given power to contract and be contracted with; to provide for lighting the streets and erection of lamp-posts; and to make such ordinances as might be necessary to carry into effect those and other powers granted. The East St. Louis Gas Company was given power by its charter to contract and be contracted with; power to manufacture and sell gas for the purpose of lighting the town of East St. Louis and territory contiguous, the town and city of that name being the same. The gas company was also given the exclusive privilege of supplying the town and contiguous territory with gas for 30 years, charges not to exceed rates of another company, and 10 per cent. added. The city contracted for gas for the period of 30 years, and, after it had received gas for some time under the contract, it declined to receive more, holding the contract invalid for want of power to make it; whereupon an action was brought to recover the sum due under the contract for the period the city had received and not paid for gas furnished.

Under this state of facts, the supreme court of Illinois held that the city was liable for gas furnished before it disaffirmed the contract. The ground on which the contract was claimed to be invalid was the want of power to make a contract to bind the city for so long a period. The court did not pass on the validity of the contract, nor is there any intimation in the opinion of either of the judges that the court would have declared the contract binding on the city; while in an elaborate opinion by one of the judges it was held that the contract was void, and that it was beyond the power of the legislature to authorize it.

In *Atlantic City Water-Works Co. v. Atlantic City* (N. J. Sup.) 6 Atl. 24, it was held that a contract made by a city having power, under its charter, to provide a supply of water for the city, by which it agreed to receive water from a water company so long as the company complied with its obligation, was valid. From the report of the case, we cannot ascertain fully what the charter powers of either corporation were; but, to the objection that the city had no power to bind itself for an indefinite period, the court replied that the contract provided a means by which the city could terminate it at any time.

These are the leading cases bearing on the question before us, and we are of the opinion that the better reason is with those that hold that a municipal corporation has no power, under such laws as operate on the contract before us, to make such a contract. Municipal officers hold but for short terms, those of the city of Brenham for but one year, and the very purpose for which short terms of office and frequent elections are required is to leave the control of municipal affairs as near as may be in the hands of the people; to make the municipal administration reflect, as near as may be, the will of the public. The reasons but emphasize the necessity for denying to a city council, or other governing body, the power, by contract or otherwise, to disable or hinder from time to time the full and free exercise of any power, legislative in its character, which the legislature has deemed proper to confer upon such corporations. Cases will arise in which it becomes necessary to make investments for permanent improvements, and as to such things the acts of the governing body then acting must necessarily be given effect. The improvement in such cases becomes the property of the city, and its power over it continues, through which it may use, change, or so deal with it as may be deemed best.

We do not wish to be understood to hold that a municipal corporation has no power, in any event, to contract for such things as are consumed in their daily use, for a period longer than the official term of the officers who make the contract; but we do intend to be understood to hold that such corporations have no power to make contracts continuous in character, in reference to such things or any others, by which they will be, in effect, precluded

from exercising from time to time any power, legislative in character, conferred upon them by law.

There is, however, another question involved in this case, which will be examined, reaching further than the one we have considered, and involving, not only the power of the municipal corporation to make the contract sued on, under the terms of the charters of both corporations, but involving the question of the power of the legislature, directly or indirectly, to confer upon the water company such rights and privileges as it claims under the contract. It is claimed that the contract creates a monopoly, and that this is in violation of the constitution, which declares that "perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed." If such is the effect of the contract, it is forbidden by the constitution, and no legislation can give validity to it. A grant which gives to one or an association of persons an exclusive right to buy, sell, make, or use a given thing or commodity, or to pursue a given employment, creates a monopoly. There are, however, certain classes of exclusive privileges which do not amount to monopolies, and a consideration of these, and the grounds on which they stand, is not now necessary.

The right to exercise the exclusive privilege need not extend to all places; it is enough that it is to operate in and to the hurt of one community. It need not continue indefinitely, so as to amount to a perpetuity; it is enough that it be an exclusive privilege, for a period of time, of the character forbidden. The more general is its application as to places and persons, and the longer it is to continue, the more hurtful it becomes. In the case before us, the contract, as we have seen, gives the exclusive right to sell to a community for public purposes for the period of 25 years, thus affecting all the inhabitants in their common right directly, and in their individual rights at least indirectly. This right to sell for public purposes carries with it, through the contract, the obligation to buy for public uses. It gives the exclusive right to sell to the inhabitants of the city for the same period, for all the private uses for which they may need water, in such ways, and to be so applied, as it can be only by a system of water-works; which is a denial, in effect, to the inhabitants of the right to buy for these private purposes from any other water company. Such an exclusive right prevents competition, and tends to high prices; all matters affecting which the contract before us surrenders the right further to regulate for a quarter of a century. It has been said, in cases to which we will hereafter refer, that there can be no monopoly in the use of a street to lay down gas or water mains or pipes, because it is not a matter of common right to use streets for such purpose. This may be admitted without affecting the question before us. When such use, however, is but a means to the exercise of an exclusive right to sell water, and to compel a city or its

inhabitants to buy it, it will be found difficult to separate the means from the end intended to be accomplished. A system of water or gas works may be operated in a town or city as well by one individual as by a private corporation, if he have the ability. No corporate franchise is necessary to that purchase. It is an occupation in which any person may engage if he has the means, which may, and ordinarily will, involve the right to use streets and other public grounds.

Thus, means to accomplish the purpose can ordinarily be acquired only through provision given directly or indirectly by the state, but cases may arise in which no such consent would be necessary. Such a franchise, when granted, is one of the fullest character, and, from its nature, subject at all times to control.

Some conflict of authority exists as to whether such contracts as that under consideration create monopolies. The question has arisen in several cases in which gas and water companies asserted exclusive right to use streets for laying down mains and pipes, under charters granted, which, in terms, gave exclusive right. The question has most frequently arisen in cases between rival companies seeking to use streets, and in which no further right was directly involved.

In *Norwich Gas-Light Co. v. Norwich City Gas Co.*, 25 Conn. 19, it appeared that a gas company, holding a charter which in terms gave it the exclusive right to use streets for the purpose of laying down pipes, renting gas-posts, burners, and other things necessary to lighting the streets, alleys, lanes, public grounds, and other places, sought to restrain a rival gas company from using the streets for a like purpose; and it was held that the charter created a monopoly which the court would not sustain, even in the absence of a constitutional provision forbidding monopolies. Such a claim asserted by a gas company holding under a contract with a municipal corporation, which assumed to give the company the exclusive right to use the streets for the purposes of its business, in another case was held to be a monopoly, and on that ground the claim held to be invalid. *State v. Cincinnati Gas-Light & Coke Co.*, 18 Ohio St. 293.

The case of *City of Memphis v. Memphis Water Co.*, 5 Heisk. 525, was very similar in its facts to the Connecticut case above noticed, and it was held that the exclusive right to use the streets of the city, given to the water company by its charter, did not create a monopoly. As this case fairly presents the theory on which such exclusive grants to use streets for gas and water purposes are maintained, we will quote a part of the opinion. The court said: "The question, then, is narrowed down to the inquiry, did the individuals composing the Memphis Water Company have the right, before their incorporation, in common with all others, to erect water-works in Memphis, to take up pavements, occupy the streets, and do such things as were necessary

and proper in completing their water-works? It is clear that none had the right to do those things except the city of Memphis, by virtue of its corporate powers, and this right on the part of the city was exclusive until it was taken away by the legislature, and transferred to the Memphis Water Company. It is no more a monopoly, when conferred on the water company, than when it belonged to the city of Memphis. It was an exclusive privilege when exercised by the city. It is an exclusive privilege in the Memphis Water Company, but not a monopoly."

In *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 6 Sup. Ct. 252, it appeared that the plaintiff had a charter which gave it the exclusive right, for the period of 50 years, of making and supplying gas-light to the city of New Orleans by means of pipes or conduits laid in the streets, to such persons as might voluntarily choose to contract for it. The defendant was subsequently chartered under a general law authorizing the formation of corporations for certain purposes, among which was the construction and maintenance of works for supplying cities or towns with gas, and it had obtained permission from the common council of New Orleans to use its streets and other public ways and places to lay mains, pipes, and conduits. This it was proceeding to do when a suit was brought to restrain it, and it was held that the exclusive grant, in connection with the facts shown, constituted a contract which state legislation could not impair. In disposing of the case, it was said: "Legislation of that character is not liable to the objection that it is a mere monopoly, preventing citizens from engaging in an ordinary pursuit or business, open as of common right to all, upon terms of equality; for the right to dig up the streets and other public places of New Orleans, and place their pipes and mains for the distribution of gas for public and private use, is a franchise, the privilege of exercising which could only be granted by the state, or by the municipal government of that city, acting under legislative authority. * * *"

To the same effect is the decision of the supreme court of Louisiana in *Crescent City Gas-Light Co. v. New Orleans Gas-Light Co.*, 27 La. Ann. 138, 147, in which it was said: "The right to operate gas-works, and to illuminate a city, is not an ancient or usual occupation of citizens generally. No one has the right to dig up the streets, and lay down gas-pipes, and carry on the business of lighting the streets and the houses of the city of New Orleans, without special authority from the sovereign. It is a franchise belonging to the state, and in the exercise of the police power, the state could carry on the business itself, or select one of several agents to do so."

Subsequently to the granting of the charter through which the plaintiff claimed, the constitution of the state of Louisiana was so changed, while preserving rights, claims, and

contracts then existing, as to provide that "the monopoly features in the charter of any corporation now existing in this state, save such as may be contained in the charter of railroad companies, are fully abrogated," and it was claimed that this could operate to divest the plaintiff's privilege. As to this the court, however, said: "The monopoly clause only evidences a purpose to reserve the policy, previously pursued, of granting to private corporations franchises accompanied by exclusive privileges as a means of accomplishing public objects. That change of policy, although manifested by constitutional enactments, cannot affect contracts which, when entered into, were within the power of the state to make." The inference from the language used is that, had the constitutional provision in regard to monopoly features in charters been in force when the plaintiff's charter was granted, its exclusive privilege, franchise, or whatever it may be termed, would have been inoperative.

In *New Orleans Water-Works Co. v. Rivers*, 115 U. S. 674, 6 Sup. Ct. 273, a suit was brought by the company to restrain Rivers from laying pipes, mains, and conduits from the Mississippi river to the St. Charles Hotel; and the claim was based on the fact that the plaintiff had a charter which gave it the exclusive right to supply the city of New Orleans and its inhabitants with water from the Mississippi river, or other stream, by mains or conduits, with such right to lay them in the streets, public places, and lands of the city, which had been granted in consideration that it would furnish water to the city free of charge. The claim of the plaintiff was sustained, and the charter held to be a contract that could not be impaired by the constitutional provision afterwards adopted, to which reference is made in the preceding case. The same inferences may, however, be drawn from the opinion, as to what would have been the effect of the provision of the constitution repealing "the monopoly features in the charter of any corporation," had it been operative at the time the plaintiff's charter was granted.

In the case of *State v. Milwaukee Gas Co.*, 29 Wis. 460, it was conceded that the grant of an exclusive right to lay pipes, for the purpose of conducting gas, in the streets, avenues, and other public places of a city, coupled with the exclusive right to manufacture and sell gas to its inhabitants for 15 years, created a monopoly.

In the *Slaughter-House Cases*, 16 Wall. 61, 65, 102, 121, 128, it was conceded that the exclusive privilege in question, in these cases, was a monopoly; but in these, as in the case last above cited, it was held that, in the absence of some constitutional provision forbid-

ding monopolies, the grant of these exclusive privileges was not invalid. Under an exclusive grant of privileges, similar to those in question in the *Slaughter-House Cases*, it was held in the case of *City of Chicago v. Rumpff*, 45 Ill. 97, that a monopoly was created. The court said: "Such action is oppressive, and creates a monopoly that never could have been contemplated by the general assembly. It impairs the rights of all other persons, and cuts them off from a share in not only a legal, but a necessary, business."

In the case of *State v. Columbus Gas-Light & Coke Co.*, 34 Ohio St. 581, it was held that such an exclusive right as the contract in this case gives, created a monopoly.

It will not do to say that an exclusive right in a municipal corporation to operate water or gas works stands upon the same ground as does such exclusive right held by a private corporation or an individual. In the one case the right is, in effect, exercised by the people who are to be affected by it, and not for profit, but for the welfare and convenience of the public and the inhabitants of the corporation. The correction of abuses in its management, whereby oppression may be avoided, is in the hands of the people; while, on the other hand, such works are operated for private gain, with every incentive to oppression, without power, in those to be affected, to relieve themselves from it. In the one case the exclusive right may create a monopoly, and in the other not.

The exclusive rights, given by the contract before us, lead to the same results as a monopoly in any other matter, and whether a monopoly or not is best ascertained by the results which are brought about by a contract or law, and the exercise of rights the one or the other may profess to confer. We are of the opinion that the exercise of the exclusive rights conferred on the water company produce the same results as would the exercise of an exclusive right which would fall within the most exacting definition of a monopoly, and that the allowance or creation of such exclusive rights is contrary to the spirit of the constitution of this state.

There are many other questions in this case which, in view of the controlling character of those already considered, need not be examined.

If the appellee furnished water between the time the works were put in operation, under the ordinance passed June 1, 1885, and the tenth July of that year, when the city declined further to regard the contract as binding, for that the city ought to be held liable; but this is the extent of the right of the appellee to recover for water furnished the city.

The judgment will be reversed, and the cause remanded.

LINN et al. v. BOROUGH OF CHAMBERSBURG.

(2S Atl. 842, 160 Pa. St. 511.)

Supreme Court of Pennsylvania. March 26, 1894.

Appeal from court of common pleas, Franklin county; John Stewart, Judge.

Suit by S. M. Linn and others against the burgess and town council of the borough of Chambersburg. From a decree for defendant, plaintiffs appeal. Affirmed.

The report of the master, William Alexander, Esq., and the opinion of the court below, were as follows:

"Master's Report.

"Finding of Facts.

"First. It is admitted that all the plaintiffs in this case are taxpayers of the borough of Chambersburg, and that all except Augustus Duncan and Benjamin C. Ross are citizens resident in the said borough.

"Second. The defendant in this proceeding is the burgess and town council of the borough of Chambersburg, a municipal corporation incorporated into a borough by an act of the general assembly of Pennsylvania, passed and approved the 21st day of March, A. D. 1803, and by the said act of incorporation the limits and boundaries of the said borough were particularly set forth, and it was enacted: 'That from and after the first Monday in May (1803) the burgess and town council duly elected and their successors shall be one body politic and corporate in law, by the name and style of the Burgess and Town Council of the Borough of Chambersburg and shall have perpetual succession. And the said burgess and town council aforesaid and their successors, shall be capable in law, to have, get, receive, hold, and possess goods and chattels, lands and tenements, rents, liberties, jurisdictions, franchises and hereditaments, to them and to their successors in fee simple or otherwise, not exceeding the yearly value of five thousand dollars, and also to give, grant, sell, let and assign, the same lands, tenements, hereditaments and rents, and by the name and style aforesaid, they shall be capable in law to sue and be sued, plead and to be impleaded, in any of the courts of law in this commonwealth, in all manner of actions whatsoever, and to have and use one common seal, and the same from time to time at their will to change and alter.' See section 3. Also: 'That it shall and may be lawful for the town council to meet as often as occasion may require, and enact such by-laws, and make such rules, regulations and ordinances as shall be determined by a majority of them necessary, to promote the peace, good order, benefit and advantage of said borough, particularly by providing for the regulation of the market, streets, alleys and highways therein; they shall have power to

assess, apportion and appropriate such taxes as shall be determined by a majority of them necessary for carrying the said rules and ordinances from time to time into complete effect; * * * provided, that no by-law, rule or ordinance of the said corporation shall be repugnant to the constitution or laws of the United States or of this commonwealth. * * * Provided also, that no tax shall be laid in any one year, on the valuation of taxable property exceeding one cent in the dollar, unless some object of general utility shall be thought necessary, in which case a majority of the freeholders of said borough in writing under their hands, shall approve of and certify the same to the town council, who shall proceed to assess the same accordingly.' See section 6.

"Third. The said borough of Chambersburg has continued to hold and exercise the rights and privileges and perform the duties granted and imposed upon it as a body politic or municipal corporation from the date of its incorporation until the present time, under its original charter and the acts of the general assembly of Pennsylvania since passed in relation thereto.

"Fourth. Since the early part of the year 1890, at the date of the filing of the bill in this case, March 22, 1892, and at the present time, the said borough of Chambersburg owns, controls, and operates an electric light plant for the purpose of providing an ample supply of light for its streets, public buildings, and grounds; and a short time prior to the filing of this bill, to wit, about December 7, 1891, the said borough made some additions to the engine, dynamos, and other machinery about the plant, and since that date it has been supplying a number of the inhabitants of the borough with electricity for the purpose of lighting their stores and places of business, and it has charged and received certain fixed charges and prices for the said supply of electricity and light.

"Fifth. The capacity of the said plant as used and operated for street-lighting purposes, prior to the additions above referred to, was sufficient for the supply of seventy arc lights of 2,000 candle power each, and this entire number of lights was used in lighting the streets and public buildings of the borough.

"Sixth. The additions and improvements made to the plant prior to the filing of the bill in this case, and within a short time thereafter, consisted of the following items: Conversion of the single-cylinder engine into a compound cylinder, and necessary pulleys and shafting, and the erection of a new stack to the boiler, at a cost of \$698; the erection of a commercial circuit, for wires, poles, brackets, insulators, etc., and labor, at a cost of about \$200; the purchase of thirty or forty arc lamps, at a cost of from \$1.200 to \$1,600; the purchase of a fifty arc light dynamo, at a cost of \$2,375. These additions and improvements were made by the

borough for the purpose of increasing the capacity of the plant, so as to be able to supply electricity to the inhabitants of the borough for lighting purposes in their stores and dwellings, at fixed charges and prices, and the said borough has been furnishing, and still is supplying, the said citizens with electricity for lighting purposes as aforesaid. Prior to March 22, 1892, seven arc lamps were in use by citizens of the borough, and since that date the number has been increased until at least thirty arc lamps of 2,000 candle power are now in use by sundry citizens of the said borough, and the same are furnished with electricity by the borough at rates and prices fixed by the burgess and town council of the borough of Chambersburg by ordinance."

(Seventh finding sets out the act of assembly of May 20, 1891.)

"Eighth. In accordance with the provisions of section 2 of the said act of May 20, 1891, and in the manner provided by the act of April 20, 1874, and the amendment thereto, passed June 9, 1891, the said borough, on the 7th day of December, 1891, at a regular meeting of the burgess and town council of the said borough, signified its desire, by a majority vote of the said town council, to make an increase of indebtedness of the said borough in the sum of \$10,000 for the purpose of increasing the electric light plant to furnish the citizens with commercial light and electricity, and to submit to the vote of the qualified electors of the borough the question as to the said increase of indebtedness at the election to be held in February, 1892. And the said burgess and town council of the said borough gave notice to the qualified electors of the said borough, by weekly advertisement in three newspapers published in said borough, for thirty days prior to the 16th day of February, 1892, setting forth the action of the said town council, and that an election would be held at the places of holding the municipal elections in said municipality on the 16th day of February, 1892 (Tuesday), between the hours of 7 a. m. and 7 p. m. of said day, for the purpose of obtaining the assent of the electors thereof to such increase of indebtedness; and the said notice contained a statement of the amount of the last assessed valuation of property, the amount of the then existing debt, the amount and percentage of the proposed increase, and the purpose for which the indebtedness was to be increased, the form of the ballot and method of voting, and the particular places for voting in the several wards.

"Ninth. The said election, as specified in the said notice, was duly held on the 16th day of February, 1892, and resulted in favor of the increase of the debt of the said borough in the sum of \$10,000, for the purpose specified in the said notice. The return of the said election was duly certified, and, with a certified copy of the action of

councils and the advertisement, it was made a record of the court of quarter sessions of Franklin county, and a certified copy of the record as aforesaid delivered by the clerk of the said court to the corporate authorities, and by them entered upon the minutes of the said corporation.

"Tenth. By virtue of the authority thus conferred upon them, the burgess and town council of the said borough proceeded to increase the indebtedness of the said borough in the sum of \$10,000 for the purpose of enlarging and extending the electric light plant of the said borough, and passed an ordinance on the 3d day of March, 1892, entitled 'An ordinance relating to the supply of incandescent and arc lighting and electricity, by the borough of Chambersburg, Pa.' This ordinance provides for contracts to be entered into by the borough with each individual citizen desiring the use of electricity for lighting purposes in stores, dwellings, churches, fairs, festivals, and other places, and prescribes the duties of the borough on the one part, and the purchaser or consumer on the other part, and fixes the rates and prices to be charged by the borough for the supply of electricity, by arc and incandescent lights, to these persons and places.

"Eleventh. In furtherance of the design and purpose of the burgess and town council of the borough of Chambersburg to increase the capacity and enlarge the electric light plant of the said borough for the supplying of electricity to its inhabitants for lighting purposes, the said authorities, before the date of the filing of the bill in this case, and after the said election held on the 16th day of February, 1892, by letter, through the chairman of the committee on electric light, invited proposals from the Thomson-Houston Electric Light Company, of Philadelphia, the Westinghouse Electric and Manufacturing Company, of Pittsburgh, and the Edison Electric Light Company, of —, and received proposals or bids from the first two companies for the furnishing of a dynamo for incandescent lighting of a capacity for 650 incandescent lamps, and the necessary appliances to operate the same, and the said borough received an incandescent dynamo of the capacity indicated, with appliances, from the Thomson-Houston Company, but have never consummated the purchase, or put the same in operation, owing to the filing of the bill in this case. The said borough also entered into a contract with the Taylor Engine Company for the purchase of an engine and boilers and necessary appliances, at a cost of \$5,839, for the purpose of supplying additional motive power to meet the increased demand for power in running the commercial lighting. This contract was entered into before the bill in this case was filed, and after February 16, 1892, and without inviting bids for the same or advertising for proposals, but the engine, etc., have never been delivered, on account of the filing of the bill in

this case. The said borough, during the same period, advertised for and received bids for the necessary changes in the building and brick stack, but never entered into contract for the same on account of the filing of the bill in this case.

* * * * *

"Fourteenth. The bonds provided for by the action of the burgess and town council of the borough of Chambersburg and the election of February 16, 1892, for the increase of the indebtedness of the borough in the sum of \$10,000 were never issued by the said municipality, the action in reference thereto being delayed by the filing of the bill in this case.

* * * * *

"Nineteenth. On the 20th day of April, 1892, at the date the burgess and town council of the said borough of Chambersburg provided for the issuing of the bonds of the said borough in the sum of \$10,000 for the purpose of enlarging the electric light plant, the said burgess and town council passed the following resolution: 'Resolved that, in order to provide for the payment of the interest and principal of said bonds, that an annual tax equal to at least eight per centum of the amount of said increased debt be levied and assessed, to be applied exclusively to the payment of the interest and principal of said indebtedness;' and on the 23d day of May, 1892, the said burgess and town council fixed the tax levy for the year commencing June 1, 1892, at four mills on the dollar for borough purposes, and five mills on the dollar for the payment of interest and the liquidation of the principal of bonds.

* * * * *

"Conclusions of Law.

* * * * *

"Second. The act of the general assembly of May 20, 1891, and the action of the burgess and town council of the borough of Chambersburg in pursuance thereof, are not in violation of section 7, art. 9, of the constitution of Pennsylvania, and the said section of the constitution does not, in letter or spirit and meaning, restrain or prohibit the legislation and action above referred to.

"Third. The proposed enlargement of the electric light plant of the borough of Chambersburg, as set forth in the findings of facts, for the purpose of manufacturing and furnishing electricity for lighting purposes to all the inhabitants of said borough who may desire to use the same, at fixed and uniform rates and charges established by ordinance of said borough, the said plant to be owned and operated by the said borough, constitutes a public service, of benefit and convenience to all the inhabitants of the said borough.

"Fourth. The legislature of the state of Pennsylvania has authority to confer the power upon municipalities of manufacturing and distributing electricity for the purpose

of furnishing light to their inhabitants for private use, and it has conferred such power upon the borough of Chambersburg by act of May 20, 1891.

* * * * *

"Seventh. The burgess and town council of the borough of Chambersburg have a lawful right to issue the bonds of the borough in the sum of \$10,000 for the purpose of raising money wherewith to erect and enlarge the present electric light plant of the said borough for the purpose of supplying electricity for commercial purposes.

"Eighth. The said burgess and town council of the borough of Chambersburg have a lawful right to enlarge the electric light plant of the said borough, to issue bonds in the sum of \$10,000 to provide for the expense incurred, and to furnish electricity for lighting purposes for private use; and the plaintiffs are not entitled to any relief against said acts of the said municipality. It is therefore recommended that the bill of the said plaintiffs be dismissed at the cost of the said plaintiffs."

"Opinion and Decree of Court.

"The purpose of this bill is to restrain the borough of Chambersburg from engaging in the manufacture of electricity for the supply and use of its citizens. The effort is made on two distinct grounds: First, that the act of 20th May, 1891, entitled 'An act to authorize any borough now incorporated, or that may hereafter be incorporated, to manufacture electricity for commercial purposes for the use of the inhabitants of said borough, and for this purpose to erect, purchase or condemn electric light plants,' etc., under which the defendants claim to exercise this right, is unconstitutional, and therefore void; second, that the debt proposed to be incurred by the borough, or which it will necessarily incur, for the purpose aforesaid, will increase the indebtedness of the borough to an amount in excess of the constitutional limit of seven per cent. of the assessed valuation of the taxable property. In both contentions the conclusions of the master are adverse to the plaintiffs, and they except thereto. The exceptions which relate to the constitutionality of the act of 20th May, 1891, are overruled. It is sufficient to say, in this connection, that our attention has not been called to any exception or prohibition in the constitution with which the act conflicts, and that we know of none. Nor can the exceptions to the master's conclusions with respect to the indebtedness of the borough be sustained. It is immaterial whether occupations be regarded as taxable property, within the meaning of the constitution, or not, so far as the result here is concerned. Eliminate entirely from the calculation the tax assessed upon occupations, and seven per centum of the assessed valuation of what remains makes a total which exceeds, by several thousand dollars, the debt of the

borough at the time referred to. But there is no reason why this tax should be eliminated. Indeed, there is express authority for including it in the calculation. This very point was raised and decided in the case of *Brown's Appeal*, 111 Pa. St. 80, 2 Atl. 77, and it now admits of no controversy.

"We have considered the exceptions to the costs taxed, but are unable to see any good reason why the bill as taxed should not be allowed. The master's work was protracted and he has given to it careful study and attention. All the exceptions to the report are overruled, and it is now, 27th January, 1893, ordered, adjudged, and decreed that the bill of complaint be dismissed, and that the plaintiffs, S. M. Linn, H. Gehr, Aug. Duncan, Benjamin C. Ross, Frank Lindsay, Isaac Stine, and Tench McDowell, pay all the costs of this proceeding."

O. C. Bowers, for appellants. J. D. Ludwig, for appellee.

PER CURIAM. This bill was brought to restrain the borough of Chambersburg from manufacturing and supplying electricity for the use and benefit of its inhabitants under the provisions of the act of May 20, 1891 (P. L. 90). It is grounded mainly on allegations which, in substance, are (1) that said act is unconstitutional, and (2) that the debt, which would necessarily be incurred by the borough in carrying into effect its proposed undertaking, will increase its indebtedness to an amount in excess of the constitutional limit of 7 per centum of the assessed valuation of taxable property within the corporate limits. As to both of these allegations the learned master's findings of fact and legal conclusions are in defendant's favor. The first five specifications charge error in overruling the several exceptions to the master's conclusions of law recited therein, respectively. For reasons sufficiently stated in the report and in the opinion of the learned president of the common pleas, approving the same, we think there was no error in refusing to sustain

either of said exceptions. The burden was on the plaintiffs to prove that the indebtedness of the borough would be necessarily increased to an amount exceeding the constitutional limit, etc. In that they were unsuccessful. While the legislative intention may not be as clearly and happily expressed as it might have been, we fail to discover anything in the provisions of the act that is in conflict with the constitution. The power of the legislature to authorize municipal corporations to supply gas and water for municipal purposes, and for the use and benefit of such of their inhabitants as wish to use and are willing to pay therefor at reasonable rates, has never been seriously questioned. In view of the fact that electricity is so rapidly coming into general use for illuminating streets, public and private buildings, dwellings, etc., why should there be any doubt as to the power to authorize such corporations to manufacture and supply it in like manner as artificial gas has been manufactured and supplied? It is a mistake to assume that municipal corporations should not keep abreast with the progress and improvements of the age.

The subjects of complaint in the remaining specifications are the learned judge's refusal to reduce the master's fee, and the decree dismissing the bill. As to the former, he says: "We are unable to see any good reason why the bill as taxed should not be allowed. The master's work was protracted, and he has given it careful study and attention." In the absence of any evidence that would justify us in saying that the fee is clearly excessive, we must assume that the compensation sanctioned by the court was not unreasonable. The decree dismissing the bill is the logical sequence of the facts and legal conclusions properly drawn therefrom. The questions involved are so well considered and so satisfactorily disposed of by the learned master and court below, that further comment is unnecessary. Decree affirmed, and appeal dismissed, with costs to be paid by appellants.

CITY OF CRAWFORDSVILLE v.
BRADEN.

(2S N. E. 849, 130 Ind. 149.)

Supreme Court of Indiana. Oct. 27, 1891.

Appeal from circuit court, Montgomery county; E. C. Snyder, Judge.

Bill by Hector S. Braden to enjoin the city of Crawfordsville from supplying private citizens with electric light. From a decree overruling defendant's demurrer, and allowing a perpetual injunction, defendant appeals. Reversed.

W. T. Brush, City Atty., Davidson & West, and Kennedy & Kennedy, for appellants. Crane & Anderson, for appellee.

McBRIDE, J. The question we are required to decide in this case is, has a municipal corporation in this state the power to erect, maintain, and operate the necessary buildings, machinery, and appliances to light its streets, alleys, and other public places with the electric light, and at the same time, and in connection therewith, to supply electricity to its inhabitants for the lighting of their residences and places of business. Some other questions are incidentally involved, but the principal controversy is as above stated. That a city or an incorporated town may buy and operate the necessary plant and machinery to light its streets, alleys, and other public places is not controverted by the appellee; but he denies the right to furnish the light to the individual for his private use. The question is argued on the theory that, if the city has such power, it must be by virtue of some express legislative grant, and is not among the implied powers possessed by municipal corporations; that statutes conferring powers upon municipal corporations, especially those involving the exercise of the taxing power, must be strictly construed; and that, strictly construed, no statute confers the necessary authority. The purchase of the necessary land, machinery, and material, and the erection and maintenance of such a plant, does involve the exercise of the taxing power. The necessary funds must be supplied by taxing the tax-payers of the municipality. The only statute bearing directly upon this question is the act of March 3, 1883. Elliott's Supp. § 794 et seq. Section 794 contains the following: "That the common council of any city in this state, incorporated either under the general act for the incorporation of cities, or under a special charter, and the board of trustees of all incorporated towns in this state, shall have the power to light the streets, alleys, and other public places of such city and town with the electric light and other form of light, and to contract with any individual or corporation for lighting such streets, alleys, and other public places with the electric light or other forms of light, on such terms, and for such times, not exceeding 10 years, as may be agreed upon." Section 795

provides that, for the purpose of effecting such lighting, the common council of a city or board of trustees of a town may provide, by resolution or ordinance, for the erection and maintenance in the streets, etc., of the necessary poles and appliances. Section 796 authorizes granting to any person or corporation the right to erect and maintain in the streets, etc., the necessary poles and appliances for the purpose of supplying the electric or other light to the inhabitants of the corporation. Section 797 validates contracts of a certain character, made before the enactment of the statute; and section 798 provides for the appropriation of lands and right of way by corporations engaged in the business of lighting cities or towns, "or the public or private places of their inhabitants, with the electric light," etc. It will be observed that, while section 796 provides for granting to third persons the right to furnish the light to the inhabitants, it does not, in terms, give any such power to the corporation. It will, therefore, be necessary for us to inquire if the corporation possesses such power independently of the statute, or, if not, if the statute is susceptible of a fair construction, in accordance with established rules, which clothes the corporation with such power. In the case of Rushville Gas Co. v. City of Rushville, 121 Ind. 206, 23 N. E. 72, this statute was considered, in so far as relates to the right of the city to buy and operate the necessary plant and machinery to light its streets, alleys, and other public places, and it was held that the statute was sufficient to confer that power. In that case the court, after announcing the conclusion above stated, used the following language: "If there were any doubt as to the meaning of the act, it would be removed by considering it, as it is our duty to do, in connection with the general act for the incorporation of cities; for that act confers very comprehensive powers upon municipal corporations as respects streets and public works, and contains many broad general clauses akin to those which Judge Dillon designates as 'general welfare' clauses. Our own decisions fully recognize the doctrine that municipal corporations do possess, under the general act, authority as broad as that here exercised, and the operation of that act is certainly not limited or restricted by the act of 1883." The eminent author above referred to thus defines the powers of municipal corporations: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation and the power is denied. Of every municipal

corporation, the charter or statute by which it is created is its organic act. Neither the corporation nor its officers can do any act, nor make any contract, or incur any liability, not authorized thereby, or by some legislative act applicable thereto. All acts beyond the scope of the powers granted are void." Dill. Mun. Corp. (4th Ed.) § 89. Judge Dillon, however, quotes approvingly from the supreme court of Connecticut as follows, (section 90, p. 147:) "All corporations, whether public or private, derive their powers from legislative grant, and can do no act for which authority is not expressly given or may not be reasonably inferred. But if we were to say that they can do nothing for which a warrant cannot be found in the language of their charters, we should deny them in some cases the power of self-preservation, as well as many of the means necessary to effect the essential objects of their incorporation. And therefore it has long been an established principle in the law of corporations that they may exercise all the powers, within the fair intent and purpose of their creation, which are reasonably proper to give effect to powers expressly granted. In doing this, they must (unless restricted in this respect) have a choice of means adapted to ends, and are not to be confined to any one mode of operation." *City of Bridgeport v. Housatonic Railroad Co.*, 15 Conn. 475-501. This principle has been repeatedly recognized by this court. Thus in *Smith v. City of Madison*, 7 Ind. 86, it is said: "The strictness, then, to be observed in giving construction to municipal charters, should be such as to carry into effect every power clearly intended to be conferred on the municipality, and every power necessarily implied, in order to the complete exercise of the powers granted." Again, in *Kyle v. Malin*, 8 Ind. 34-37, the court said: "The action of municipal corporations is to be held strictly within the limits prescribed by the statute. Within these limits, they are to be favored by the courts. Powers expressly granted or necessarily implied are not to be defeated or impaired by a stringent construction."

Among the implied powers possessed by municipal corporations in this state are those grouped under the somewhat comprehensive title of "police powers,"—a power which it is difficult either to precisely define or limit; a power which authorizes the municipality in certain cases to place restrictions upon the power of the individual, both in respect to his personal conduct and his property, and also furnishes the only authority for doing many things not restrictive in their character, the tendency of which is to promote the comfort, health, convenience, good order, and general welfare of the inhabitants. The police power primarily inheres in the state; but the legislature may, and in common practice does, delegate a large measure of it to municipal corporations. The power thus delegated may be conferred in express terms, or it may be

inferred from the mere fact of the creation of the corporation. The so-called inferred or inherent police powers of such corporations are as much delegated powers as are those conferred in express terms, the inference of their delegation growing out of the fact of the creation of the corporation, and the additional fact that the corporation can only fully accomplish the objects of its creation by exercising such powers. Special charters, as well as general statutes for the incorporation of cities and towns, usually contain a specific enumeration of powers granted to, and which may be exercised by, such corporations. In many cases, the powers thus enumerated are such as would be implied by the mere fact of the incorporation. Where powers are thus enumerated in a statute which would belong to the corporation without specific enumeration, the specific statute is to be regarded, not as the source of the power, but as merely declaratory of a pre-existing power, or, rather, of a power which is inherent in the very nature of a municipal corporation, and which is essential to enable it to accomplish the end for which it is created. And the enumeration of powers, including a portion of those usually implied, does not necessarily operate as a limitation of corporate powers, excluding those not enumerated. *Clark v. City of South Bend*, 85 Ind. 276; *Bank v. Sarlls* (Ind. Sup.) 28 N. E. 434.

The corporation, notwithstanding such enumeration, still possesses all of the usually implied powers, unless the intent to exclude them is apparent either from express declaration, or by reason of inconsistency between the specific powers conferred and those which would otherwise be implied. The legislature can unquestionably take from municipal corporations powers which would inferentially be conferred upon them by their creation, or it can restrict the exercise of such powers, or in any manner control their exercise; the legislative will being as to such matters supreme. Among the implied powers possessed by municipal corporations is the power to enact and enforce reasonable by-laws and ordinances for the protection of health, life, and property. Thus, in this state, it has been held that, independently of any statutory authority such corporations possess the inherent power to enact ordinances for the protection of the property of its citizens against fire. *Baumgartner v. Hasty*, 100 Ind. 575; *Bank v. Sarlls*, supra; *Hasty v. City of Huntington*, 105 Ind. 540, 5 N. E. 559; *Clark v. City of South Bend*, 85 Ind. 276; *Corporation of Bluffton v. Studabaker*, 106 Ind. 129, 6 N. E. 1. This power will not only authorize the enactment and enforcement of ordinances establishing fire limits, regulating building and repairing buildings, and regulating the storage and traffic in inflammable or explosive substances, but the purchase of apparatus for extinguishing fires and furnishing a supply of water. *Corporation of Bluffton v. Studabaker*, supra. In the case of

City of St. Paul v. Laidler, 2 Minn. 190 (Gil. 159), the supreme court of Minnesota, after holding that a municipal corporation is "a creature of the law, and in the exercise of its authority cannot exceed the limits therein prescribed," says: "It is a body of special and limited jurisdiction; its powers cannot be extended by intendment or implication, but must be confined within the express grant of the legislature;" and then says further: "Incidental to the ordinary powers of a municipal corporation, and necessary to a proper exercise of its functions, is the power of enacting sanitary regulations for the preservation of the lives and health of those residing within its corporate limits." If this statement is correct, it follows that to concede to municipal corporations the possession of such powers does not involve any extension, either by intendment or implication, of the powers expressly conferred by statute; but that, by the act authorizing the organization of the corporation, the legislature expressly delegates to the municipality the power to take such steps as are necessary to preserve the health and safety (and we will add the property) of its inhabitants. The inference of the delegation of such powers follows inevitably and irresistibly, because their exercise is necessary to the accomplishment of the objects of the incorporation. When a municipal corporation attempts to exercise any of the powers thus implied, or inferentially conferred, it is within the rule of *Kyle v. Malin*, supra, as fully as it is when attempting to exercise those powers the warrant for which is found in the express letter of its organic law. It is to be favored by the courts, and such powers are not to be defeated or impaired by a stringent construction. It is, of course, important and necessary to know in each case that the power claimed is in fact included in the implied powers of the corporation.

There can be little or no doubt that the power to light the streets and public places of a city is one of its implied and inherent powers, as being necessary to properly protect the lives and property of its inhabitants, and as a check on immorality. This is forcibly set forth by Judge Dillon in his work on Municipal Corporations, as follows: "In a most important particular, however, Rome suffers by comparison with modern cities. Its public places were not lighted. All business closed with the daylight. The streets at night were dangerous. Property was insecure. No attempt at public illumination was made. The idea does not seem to have occurred to them. Persons who ventured abroad on dark nights were dimly lighted by lanterns and torches. * * * No more forcible illustration of the necessity and advantages of lighting a city can be given than the pictures drawn by Lanciani and Macaulay of the state of a great city buried in the darkness of night; and they show how clearly the power to provide for this is essentially and

peculiarly one pertaining to municipal rule and regulation. Nor are these studies, and the facts that they reveal, without practical value to the jurist. They demonstrate that a large and dense collection of human beings, occupying a limited area, have needs peculiar to themselves, which create the necessity for municipal or local government and regulation, and this, in its turn, the necessity for corporate organization. The body thus organized, as it has duties, so it acquires rights peculiar to itself, as distinguished from the nation or state at large." *Dill. Mun. Corp.* (4th Ed.) § 3a. While Judge Dillon's remarks have, of course, special reference to great cities, the difference in that respect between the greater and the minor municipal corporations is a difference in degree, and not in kind. Wherever men herd together, in villages, towns, or cities, will be found more or less of the lawless and vicious, and crime and vice are plants which flourish best in the darkness. So far as lighting the streets, alleys, and public places of a municipal corporation is concerned, we think that, independently of any statutory power, the municipal authorities have inherent power to provide for lighting them. If so, unless their discretion is controlled by some express statutory restriction, they may, in their discretion, provide that form of light which is best suited to the wants and the financial condition of the corporation. It is well settled that the discretion of municipal corporations, within the sphere of their powers, is not subject to judicial control, except in cases where fraud is shown, or where the power or discretion is being grossly abused, to the oppression of the citizen. *Valparaiso v. Gardner*, 97 Ind. 1; 15 Am. & Eng. Enc. Law, 1046, and authorities there cited. We can see no good reason why they may not also, without statutory authority, provide and maintain the necessary plant to generate and supply the electricity required. Possessing authority to do the lighting, that power carries with it incidentally the further power to procure or furnish whatever is necessary for the production and dissemination of the light. The only authority cited which holds a contrary doctrine is that of *Spaulding v. Inhabitants* (Mass.) 26 N. E. 421. We are, however, unable to recognize the validity of the reasoning in that case. We are unable to see the analogy between the city of Boston, because authorized to light its streets, engaging in whale fishery to procure oil for that purpose, or the other supposed cases, and the generation and supply of electricity. Electricity is not a commodity which can be bought in the markets, and transported from place to place like oil. We take judicial notice of the laws of nature and of nature's powers and forces, and therefore take judicial notice of that which is known as "electricity," and of its properties; not, of course, of the various methods of generating and transmitting or using it, but of the thing itself, and of its nature. As in

many other cases, here the judicial presumption outruns the fact, and we are supposed to know and to take judicial notice of more than we can in fact know in the present state of scientific knowledge. We must know, however, that it cannot be generated and transported from place to place as we can procure and transport oil, clothing, etc., and that it can only be conveyed from the place where it is generated to where it is needed for lighting the streets, or to the numerous inhabitants of a city, so as to enable them to use it as a general illuminant by invoking and exercising the power of eminent domain.

The corporation possessing, as it does, the power to generate and distribute throughout its limits electricity for the lighting of its streets and other public places, we can see no good reason why it may not also at the same time furnish it to the inhabitants to light their residences and places of business. To do so is, in our opinion, a legitimate exercise of the police power for the preservation of property and health. It is averred in the complaint that the light which the city proposes to furnish for individual use is the incandescent light. Here, again, is a fact of which we are authorized to take judicial knowledge. A light thus produced is safer to property and more conducive to health than the ordinary light. Produced by the heating of a filament of carbon to the point of incandescence in a vacuum, there is nothing to set property on fire, or to consume the oxygen in the surrounding air, and thus render it less capable of sustaining life and preserving health. But little authority has been cited bearing on the precise question, and we have been able to find but little. The case of *Mauldin v. Council* (S. C.) 11 S. E. 434, has been cited by the appellee. That was, like this, a suit by tax-payers of the city of Greenville to restrain the city council from purchasing and operating an electric light plant to light the streets and public buildings of the city, and from using it for lighting private residences. In that case the court says: "The city has the express power to own property, and the implied power to light the city. * * * Considering that some discretion as to the mode and manner should be allowed the municipality in carrying out the conceded power to light the streets of the city, we hold that the purchase of the plant was not ultra vires and void, so far as it was designed to produce electricity suitable for and used in lighting the streets and public buildings of the city." The court, however, denied the right to furnish the light to the individual citizen on the ground that to do so would be entering into private business, outside of the scope of the city government. The court refers to the lack of authority on the precise question, and that it is largely a question of the first impression, without authority. The case of *Thompson-Houston Electric Co. v. City of Newton*, 42 Fed. 723, was a suit to enjoin the city of Newton from

purchasing and operating an electric light plant, and furnishing the light to the inhabitants. The only statutory authority claimed by the city is as follows: "To establish and maintain gas-works or electric light plants, with all the necessary poles, wires, burners, and other requisites of said gas-works or electric light plants." Acts 22d Gen. Assem. Iowa, p. 16. It will be observed that this statute does not in terms confer any power not, in our opinion, as above stated, included among the implied powers of municipal corporations. The court says: "It is also urged that the city has only the authority to erect an electric plant for the purpose of lighting the streets and public places of the city, and is not authorized to furnish light for use in the houses and stores of its citizens. * * * It has been the uniform rule that a city, in erecting gas-works or water-works, is not limited to furnishing gas or water for use only upon the streets and other public places of the city, but may furnish the same for private use; and the statutes of Iowa now place electric light plants in the same category." The case of *Smith v. Mayor, etc.*, 88 Tenn, 464, 12 S. W. 924, is also in point as to the principle involved. The charter of the city of Nashville contained the following in its enumeration of the powers conferred upon the city: "To provide the city with water by water-works, within or beyond the boundaries of the city, and to provide for the prevention and extinguishment of fires, and organize and establish fire companies." Acting under the authority thus conferred, the city established water-works, and, in addition to making provision for the extinguishment of fires, it furnished water to the citizens. The right to do this was disputed, and formed the principal subject of controversy. The court said: "Nothing should be of greater concern to a municipal corporation than the preservation of the good health of the inhabitants. Nothing can be more conducive to that end than a regular and sufficient supply of wholesome water, which common observation teaches all can be furnished in populous cities only through the instrumentality of well-equipped water-works. Hence for a city to meet such a demand is to perform a public act, and confer a public blessing. It is not strictly a governmental or municipal function, which every municipality is under obligations to assume and perform, but it is very closely akin to it, and should always be recognized as within the scope of its authority, unless excluded by some positive law. * * * It is the doing of an act for the public weal,—a lending of corporate property to a public use. * * * It cannot be held that the city in doing so is engaging in a private enterprise, or performing a municipal function for a private end." While the authorities on the precise question are meager, we think the weight of authority, as well as of reason, tends to sustain the right of the municipality through its proper officers, acting

in the exercise of a sound discretion, to furnish light as well as water to its inhabitants, not only in its public places, but in their private houses and places of business.

An additional question is presented and discussed. It is shown by the averments of the complaint that such action as the city authorities have taken, and are proposing to take, is by virtue of a resolution adopted by the city council, and not by virtue of an ordinance, and that, if the city is authorized to erect and operate an electric light plant, it can only do so by virtue of an ordinance duly enacted. In so far as the city derives any

authority from the act of March 3, 1883 (Elliott's Supp. § 794 et seq), it is authorized to act either by resolution or ordinance; but aside from the statute, where the city council has power to act in a given case, and its charter does not prescribe the manner of action, it may accomplish its purpose by resolution as well as by ordinance. Note to *Robinson v. Mayor, etc.*, 34 Am. Dec. 632, and authorities there cited. The court erred in overruling the demurrer to the complaint. The cause is reversed, at the costs of the appellee, with instructions to the circuit court to sustain the demurrer.

In re BOROUGH OF MILLVALE.

Appeal of HOWARD et al.

(29 Atl. 641, 162 Pa. St. 374.)

Supreme Court of Pennsylvania. July 11, 1894.

Appeal from court of quarter sessions, Allegheny county.

Action by James Howard and others, taxpayers, to enjoin the burgess and town council of the borough of Millvale from issuing bonds for an increased indebtedness. The complaint was dismissed, and plaintiffs appeal. Affirmed.

H. I. Riley and Lyon, McKee & Sanderson, for appellants. R. H. Jackson, for appellee.

GREEN, J. A careful examination of the complaint in this case, and of the answer and the affidavits submitted on both sides, satisfies us that the learned court below was right in the conclusions reached in the opinion filed. We can scarcely doubt that the proceedings by the burgess and councils, having in view the erection of new works, were animated and conducted with an unseemly desire to injure the Bennett Water Company, to destroy the value of its franchises, to disregard the terms of the solemn contract made by the borough with that company, and with an entire willingness to evade the teachings of ordinary morality, business integrity, and common honesty.* Throughout the entire record, there cannot be found the least evidence of any fault on the part of the water company, either in the structure of their works, or in the efficiency of their service. When, at the meeting of councils on August 16, 1893, an envelope respectfully addressed to the burgess and town council of the borough of Millvale was received by that body, and a motion was made to open and read it, which the chairman, Eades, pronounced to be out of order upon a mere subterfuge, a deliberate insult was added to the other acts of oppression and injustice of which the burgess and councils had been guilty. The envelope was not opened until September 6th following,—a period of 21 days,—and when it was read it was found to contain a proposition from the water company to sell their works for \$61,500. At the same meeting of August 16th, the councils, with undue haste, voted to award the contract for the new works to Chanley Bros. & Co., who were declared to be the lowest and best bidders, and when the contract was reduced to writing, and executed, the price to be paid was \$63,500, exclusive of the cost of necessary land to be obtained. It is not difficult to draw the inference that the proposition of the Bennett Water Company was refused a hearing because it was feared that it might contain a lower bid than that at which the contract

was awarded. In such circumstances as these, and others of a kindred character, it is much to be regretted that we can discover no way of arresting such proceedings. The difficulty arises from the character of the defendant corporation. It is a municipal body, clothed with the power of legislation, to a limited extent; and, when within the limits of its authority, its acts are obligatory, not only upon the municipal body in its organized capacity, but upon the citizens who dwell within its territorial confines. In the very important contract which was made between it and the water company, there was no restriction placed upon its right to erect water works in the future. That is a right given to all such bodies by law, and they may exercise it, no matter at what cost to private companies, whose franchises are held subject to such right. This subject was fully considered by this court in the case of Lehigh Water Co.'s Appeal, 102 Pa. St. 515, where we held that the right of a borough to erect waterworks was entirely independent of the right of private corporations to erect similar works, and that it was a matter of no consequence that such erection injured private franchises of the same character.

It is claimed for the appellants in this case that in incurring a debt of \$80,000 in addition to a pre-existing debt of \$23,000 and upwards, with a tax levy of 10 mills for ordinary purposes, and an additional tax of 3% mills, which would be necessary to pay the interest and principal of the new debt, the legal limit of possible indebtedness would be exceeded. The 7 per cent. limit would not be exceeded. This is admitted. The special, local act of March 12, 1873 (P. L. 263), was simply a grant of power to levy a tax of 10 mills for general borough purposes. There is nothing in that act to prevent the levying of an increased tax to pay the interest or principal of a debt which may lawfully be created in the future. The power to erect waterworks necessarily includes the power to raise the money to pay for them, and as increased indebtedness, within the limit of 7 per cent., may be created under the constitution of 1874, we do not understand how such increase can be regarded as invalidated by either the constitutional limit of 7 per cent. or by the act of April 20, 1874 (P. L. 65). The very object of the act of April 20th was to enable any county, city, borough, or other municipality to increase the amount of its existing indebtedness. The second section of the act enables the municipal authorities to increase the debt to the extent of 2 per cent. of the assessed value of the taxable property therein, and the third section confers the power to increase beyond 2 per cent., but not exceeding a total indebtedness of 7 per cent., by means of an election conducted with certain prescribed formalities. The latter method was pursued in this case, and there are no objections made

* Equivalently Pennsylvania!

to the validity of the increase on the ground that any of the prescribed formalities were not observed.

It is contended for the appellant that an absolute limit of the taxing power of the borough was fixed by the Act of March 12, 1873, supra, at 10 mills upon the assessed valuation of the property of the borough; and as this act was not repealed by the act of April 20, 1874, that limitation still remains, and therefore avoids the present proposed increase. We cannot possibly assent to such contention. We regard this very proposition as denied by the decision of this court in Appeal of City of Wilkes-Barre, 116 Pa. St. 360, 9 Atl. 308, where the same contention was made. We there went further than is required in this case, and held that the taxes authorized to be levied and collected might be applied to the payment of indebtedness contracted, as well previously as subsequently to the constitution of 1874. That is not the case here, where the only allegation is that an annual assessment of $3\frac{2}{3}$ mills tax will be necessary to pay 8 per cent. of the increased debt of \$80,000. The answer denies that it will be necessary to levy so large a tax as that for that purpose, but, even if it were, it would not be an excessive exertion of the taxing power of the borough. In order that this power may be exercised, it is not at all necessary that the act of March 12, 1873, authorizing annual taxation at the rate of 10 mills, should be repealed. The constitution of 1874, and the subsequent legislation, confer additional power to increase municipal indebtedness, and to levy additional taxation, without any necessity for repealing pre-existing limitations of the tax rate for ordinary municipal purposes.

In regard to the allegation that the voters were induced to vote in favor of the increase by means of misrepresentation, it is obvious that the judiciary department of the government cannot go into such an inquiry. The voters are responsible for their votes, and are necessarily supposed to inform themselves as to the reasons and motives for the votes which they decide to cast. To institute an inquiry for such reasons and motives in each individual case would be a work of impossible performance, and of no value if accomplished. The actual vote cast is the only test of the action of the body of voters.

We cannot see our way clear to declare the contract for the erection of the works void for want of a previously enacted ordinance authorizing it to be made. It is true, there should have been such an ordinance. The act of April 28, 1854 (P. L. 513), requires that ordinances of the borough of Birmingham shall be recorded; but no penalty is provided for its violation, except that such ordinances shall not go into effect until two weeks after they have been recorded.

And this was held mandatory in Appeal of Borough of Verona, 108 Pa. St. 53. The act appears to be applicable to the borough of Millvale, because the act of March 18, 1869 (P. L. 422), confers all the rights, privileges, franchises, etc., of the borough of East Birmingham upon the borough of Millvale. But in Verona's Appeal it was held that an act passed in 1873, validating the general plan of the borough, cured the defect arising from the want of record. And in Borough of Milford v. Milford Water Co. (Pa.) 17 Atl. 185, so much relied upon by appellants, it was held that, although the original ordinance was void, because members of the water company were also members of the councils, another and similar ordinance might have been passed at any time subsequently, when the councils were purged of the presence of the members of the water company. In the present case, we are not referred to any provision of the law which makes the contract void for want of a previously enacted ordinance, where it was actually adopted and authorized by proper vote, in the form of a resolution at a properly called meeting of the council. Such a resolution was passed at the meeting of August 16, 1893; and at the meeting of August 29, 1893, the contract in writing was produced and read, with the specifications, and both were adopted. At the meeting of August 29th the contract was presented, and the burgess and clerk were authorized to sign it, and affix the corporate seal. Afterwards, at the meeting of October 3, 1893, a formal ordinance was enacted, directing the erection of water-works according to the plans and specifications previously adopted; the sum of \$65,000, arising from the loan of \$80,000, which had been authorized by the previous popular vote, was appropriated for the construction of the works; and all previous contracts, acts, or other things theretofore done in pursuance of any resolution or vote of the burgess and council in relation to the erection of water-works were duly ratified and confirmed, as fully as if done after the passage of the ordinance. This ordinance was duly published, recorded in the ordinance book of the borough, and signed by the burgess. We are unable to see why this ordinance does not accomplish the same effect as if it had been enacted before the contract was executed. Viewed as an ordinance, as of its own date, it was certainly effective to authorize all subsequent action in execution of the contract, and the greater part of the work was then yet to be done. The previous authorization of the contract by resolution was not void in itself. It was not affected by any badge of fraud, nor by any want of capacity in the members of council. The ordinance is subject, really, only to the objection that it ought to have been enacted at a somewhat earlier date. But that circumstance does not avoid it, and it was still directly ap-

plicable to all subsequent work. As to previous work, it is certainly good by way of ratification. Dill. Mun. Corp. § 385. "A municipal corporation may ratify the unauthorized acts and contracts of its agents or officers which are within the corporate powers, but not otherwise."

There is no question that the erection of waterworks was entirely within the corporate powers of the borough. Upon the whole case, we feel constrained to affirm the action of the learned court below. Decree affirmed, and appeal dismissed, at the cost of the appellants.

HURON WATERWORKS CO. v. CITY OF HURON.

MYERS et al. v. CITY OF HURON et al.

(62 N. W. 975, 7 S. D. 9.)

Supreme Court of South Dakota. April 20, 1895.

Appeal from circuit court, Beadle county; A. W. Campbell, Judge.

Two actions, one by the Huron Waterworks Company against the city of Huron, and one by H. Ray Myers and Henry Schaller, on behalf of themselves and all other taxpayers similarly situated, against the city of Huron and the Huron Waterworks Company. The actions were consolidated, and from the judgment rendered the city of Huron, H. Ray Myers, and Henry Schaller appeal. Reversed.

A. W. Wilmarth and H. Ray Myers, for appellants. John L. Pyle, for respondents.

CORSON, P. J. These two actions were consolidated and tried together in the court below, as they involved substantially the same question. Judgments were rendered in both actions in favor of the Huron Waterworks Company, and from the judgments the city of Huron and H. Ray Myers and Henry Schaller have appealed to this court.

A few paragraphs from the complaint of H. Ray Myers and Henry Schaller and three findings of fact by the court will sufficiently present the case for the purposes of this decision.

It is alleged in the complaint: "(3) That heretofore, and during the years 1883 and 1884, under and by virtue of the power conferred by said charter of the city of Huron, the city of Huron did construct, and cause to be constructed, a system of waterworks, consisting of engine, boiler, pumps, water mains, pipes, hydrants, sewers, and all other appurtenances necessary to a complete system of waterworks, at a great expense, to wit, as informed and believed by the plaintiffs, to be the sum of forty thousand dollars; and to pay for said waterworks and sewer, said city council issued the bonds of the city of Huron, for said forty thousand dollars, payable fifteen years after date, bearing interest at the rate of seven per cent. per annum, having first been directed to issue said bonds by vote of the people, at an election duly called and held for that purpose, as provided by said charter. (4) That heretofore, and during the year 1886, the said city of Huron caused to be bored and constructed a large six-inch artesian well, as a part of an addition to the aforesaid system of waterworks, and, as informed and believed, at an expense of four thousand five hundred dollars." "(6) That said city of Huron, from the year 1883 to July 21, 1890, through its city council, operated, controlled, and maintained said waterworks, and made all need-

ful rules and regulations concerning the distribution and use of water supplied by said waterworks for the prevention and extinguishment of fires, and to supply the citizens and taxpayers at a moderate and reasonable rate, in accordance with the provisions of section 7, subd. 9, of the charter of said city." "(8) That, at the time of the commission of the grievances hereinafter mentioned, said waterworks were owned by, and were of great value to, said city and taxpayers of said city of Huron, amounting, as informed and believed by the plaintiffs, to at least one hundred thousand dollars." (12) That "the mayor and city council of said city of Huron, on or about the 21st day of July, 1890, did unlawfully and wrongfully, and in violation of the city charter and their high and legal duties and trust reposed in them by the taxpayers and corporators of the city of Huron, execute and deliver to the defendant, the Huron Waterworks Company, a deed in terms conveying to said defendant, the Huron Waterworks Company, the entire valuable waterworks system of and belonging to the city of Huron, including all machinery, buildings, grounds, engines, boilers, water mains, hydrants, artesian well, pumps, and all property and effects of every description appertaining to said waterworks system, and placed the said defendants the Huron Waterworks Company in full possession and control of the same, without the consent and to the great injury of the taxpayers and corporators of the city of Huron." The plaintiffs conclude with a prayer that the sale and conveyance might be declared null and void; that the officers of said city be enjoined from paying over to the Huron Waterworks Company the rents for the use of water for the city purposes contracted to be paid by the common council of the city; and that the possession of said waterworks property be restored to the city.

The court, among others, found the following facts: "Fourth. That the city of Huron made said conveyance in pursuance of an agreement to make the same, entered into on the 16th day of July, 1890, at which time ten thousand dollars was paid into the city treasury by the Dakota Farm Mortgage Company, for the use of said Huron Waterworks Company, and on the 21st day of July, 1890, the balance of thirty-five thousand dollars of the purchase price was paid into the city treasury by the Dakota Farm Mortgage Company for the use of said Huron Waterworks Company, and on that day the city executed said deed of conveyance, and delivered the same to said Huron Waterworks Company, and placed said company in possession of said waterworks." "Seventh. That said waterworks plant was constructed and used by said city of Huron for the convenience of the citizens of the compact community embraced within the corporate limits of said city, for furnishing water to private consumers, for domestic and power purposes, and for the protection of

said city and its inhabitants from the ravages of fire, and the same has at all times been used for those purposes, both by the city before the sale, and by said waterworks company since said sale." "Tenth. I find that neither the city, nor the taxpayers of the same, have ever paid or tendered back to said waterworks company any part of the purchase price of the said waterworks, or any part of the sum paid out for the repairs or extensions of said waterworks system, and no effort has been made on the part of the city or taxpayers to place the waterworks company in the same condition as they were before the sale and delivery of the said property."

The material facts in the action of Huron Waterworks Co. v. City of Huron are stated in the opinion delivered in that case on a former appeal, reported in 54 N. W. 652, 3 S. D. 610, and, it is sufficient to say, its object was to obtain an injunction against the officers of the city, restraining them from interfering with the waterworks property.

It will not be necessary to notice the numerous assignments of error, as we shall confine ourselves to the discussion of only two questions raised by the record, which are: First. Did the common council of the city of Huron possess the power, unaided by state legislation, to sell and transfer the Huron waterworks system to the Huron Waterworks Company, a private corporation? Second. If the city council did not possess the power to dispose of the waterworks property, can the city of Huron regain possession of the same, without refunding to the Huron Waterworks Company the money advanced or paid by it as consideration for the same?

(1) The learned counsel for the appellants the city of Huron, H. Ray Myers, and Henry Schaller contend: First. That the waterworks system of the city of Huron, having been constructed, by virtue of a power conferred upon the city, at the expense of the corporation, became the property of the city, for public use, and was charged with a trust, and that the common council of said city, without the sanction of state legislation, did not possess the power to sell or dispose of the same. Second. That the waterworks system of the city of Huron, having been constructed, kept, and maintained for public purposes, namely, for the supply of water for the extinguishment of fires within the corporate limits of the city, and for the supply of the inhabitants of said city with pure and wholesome water for domestic purposes, was clothed with a public trust of which the inhabitants of said city were the beneficiaries, and the common council of said city could not, without the consent of the legislative power of the state, divest said city of the trust. Third. That the only power conferred upon the city of Huron by its charter was the power to "construct and maintain" waterworks for the city, and that the power to "construct and maintain" does not include the

power to sell or dispose of the same. Fourth. That the attempted sale and transfer of the said waterworks by the mayor and common council was without authority and void; and that, such sale being void, the city of Huron, in its corporate capacity, is entitled to the possession of said waterworks property, without refunding to the pretended purchasers, the Huron Waterworks Company, the amount paid by it as the consideration of said purchase.

The learned counsel for the respondents insists: "First. The city had power under its charter to dispose of this property, because it was erected for the private advantage of the people of the compact community of which the municipality was composed, and is not charged with any public trust for the general public. Second. That the property was not devoted to a different use from that for which it was erected, and the city had the power to contract with a private corporation, and for such purpose, and for its maintenance, the location of the legal title is a matter of no concern whatever. Third. That, even if the city has made a contract in excess of its powers, it cannot be relieved from the effects of such contract until it has placed the plaintiff in the same position as it was before the contract was entered into. Fourth. That, if the city has exercised a power beyond its charter, only the state can complain of such action in an appropriate proceeding instituted by the state. * * * Sixth. The city, while it was authorized to, was not bound to maintain these waterworks, and the court can not compel it nor its officers to do so. * * * Eighth. All the contracts and deeds, taken together, are only an appropriate means of carrying out the powers conferred upon the city. They are only an appropriate means of providing for the maintenance of the waterworks system and for extensions to the same. * * *"

The city of Huron was incorporated under a special charter, and there are only three sections called to our attention as bearing upon the question, which are as follows: Section 1 provides: "That the city of Huron * * * shall have power to make all contracts necessary to the exercise of its corporate powers, to purchase, hold, lease, transfer and convey real and personal property for the use of the city * * * and to exercise all the rights and privileges pertaining to a municipal corporation." Section 7, pt. 8, provides as follows: "The city council shall have power * * * to organize and support fire companies, hook and ladder companies, and provide them with engines and all apparatus for extinguishment of fires, * * * to construct and furnish reservoirs, wells, cisterns, aqueducts, pumps, and other apparatus for protection against fires, and to establish regulations for the prevention and extinguishment of fires." Section 7, pt. 9, provides as follows: "The city council shall have power * * * to construct and main-

tain waterworks and make all needful rules and regulations concerning the distribution and use of water supplied by such waterworks."

The waterworks of said city, as found by the court, were constructed and used by said city of Huron for protection against fire and for domestic purposes, and it had been so maintained and used for a number of years prior to said alleged sale. They were constructed by the corporation and at the expense of the same. No express power to sell or convey said property has been conferred upon the mayor and common council of said city, nor upon the corporation itself, unless such power is included in the powers conferred upon the city by section 1, which, as we have seen, provides "that the city of Huron * * * shall have power * * * to purchase, hold, lease, transfer and convey real and personal property for the use of the city, * * * and to exercise all the rights and privileges pertaining to a municipal corporation." The counsel for the respondents concedes that there is a class of property owned by a city that the common council of a city do not possess the power to sell, and he admits that public parks, squares, commons, cemeteries, etc., come within this class; but he insists that the waterworks of a city, though constructed by the city at the expense of the corporation, and used for protection against fire, and for the purposes of supplying pure and wholesome water to the citizens, do not belong to this class. It is necessary, therefore, to determine the nature and character of waterworks properly held by a city. The grounds upon which municipal corporations are denied the power to sell and convey the class of property above referred to are that such property is held by the corporation for public use, and is therefore charged with a public trust of which the corporation cannot divest itself, except by the express authority of the lawmaking power of the state.

The duties imposed upon municipal corporations for governmental purposes purely need not be considered, as it cannot be claimed that the exercise of the power to create and maintain city waterworks is strictly a governmental purpose, so far as it relates to the state at large. Neither are public squares, parks, wharves, cemeteries, landing places, fire apparatus, etc., held for governmental purposes, in the sense that they relate to the general public of the state; but they are governmental in the sense that they exist for public use,—that is, for that portion of the public embraced within the limits of the city. This distinction is well stated by Judge Dillon in his work on Municipal Corporations. That learned author says: "As respects the usual and ordinary legislative and governmental powers conferred upon a municipality, the better to enable it to aid the state in properly governing that portion of its people residing within the municipality, such powers

are in their very nature public, although embodied in a charter, and not conferred by laws general in their nature and applicable to the entire state. But powers or franchises of an exceptional or extraordinary or nonmunicipal nature may be, and sometimes are, conferred upon municipalities, such as are frequently conferred upon individuals or private corporations. Thus, for example, a city may be expressly authorized in its discretion to erect a public wharf, and charge tolls for its use, or to supply its inhabitants with water or gas, charging them therefor and making a profit thereby. In one sense such powers are public in their nature, because conferred for the public advantage. In another sense, they may be considered private, because they are such as may be, and often are, conferred upon individuals and private corporations, and result in a special advantage or benefit to the municipality as distinct from the public at large. In this limited sense, and as forming a basis for the implied civil liability for damages caused by the negligent execution of such powers, it may be said that a municipality has a private as well as a public character. And so, as hereafter shown, a municipality may have property rights which are so far private in their nature that they are not held at the pleasure of the legislature." 1 Dill. Mun. Corp. § 27. While parks, squares, wharves, landing places, fire apparatus, etc., are not absolutely necessary, to enable a municipal corporation to perform its strictly governmental duties, so far as they relate to the state at large, they are so far held for governmental purposes that they cannot be appropriated to any other use without special legislation. Mr. Chief Justice Waite, in speaking of this class of city property in *Meriwether v. Garrett*, 102 U. S. 473, says: "(1) Property held for public uses, such as public buildings, streets, squares, parks, promenades, wharves, landing places, fire engines, hose and hose carriages, engine houses, engineering instruments, and generally everything held for governmental purposes, cannot be subjected to the payment of the debts of the city. Its public character forbids such an appropriation." And Mr. Justice Field, in the same case (page 513), says: "What, then, is the property of a municipal corporation, which, upon its dissolution, a court of equity will lay hold of and apply to the payment of its debts? We answer, first, that it is not property held by the corporation in trust for a private charity, for in such property the corporation possesses no interest for its own uses; and, secondly, that it is not property held in trust for the public, for of such property the corporation is the mere agent of the state. In its streets, wharves, cemeteries, hospitals, courthouses, and other public buildings, the corporation has no proprietary rights distinct from the trust for the public. It holds them for public use, and to no other use can they be appropriated without special legislative sanction. It would be a perver-

sion of that trust to apply them to other uses." It is difficult to perceive upon what principle a distinction can be made between the waterworks of a city, constructed at the expense of the corporation and used to supply water for fire purposes, domestic use, and other city purposes, and public parks, squares, fire apparatus, public buildings, etc., used for public purposes, and the courts in the later decisions seem to make no such distinction. Judge Dillon, in his work above referred to, says: "In some of the states it is held that the private property of municipal corporations—that is, such as they own for profit, and charged with no public trusts or uses—may be sold on execution against them. * * * On principle, in the absence of statutable provision, or legislative policy in the particular state, it would seem to be a sound view to hold that the right to contract and the power to be sued give to the creditor a right to recover judgment; that judgments should be enforceable by execution against the strictly private property of the corporation, but not against any property owned or used by the corporation for public purposes, such as buildings, hospitals, and cemeteries, fire engines and apparatus, waterworks, and the like; and that judgments should not be deemed liens upon real property, except when it may be taken in execution." Dill. Mun. Corp. § 576. It will be noticed that Judge Dillon places waterworks in the same class with public buildings, hospitals, cemeteries, etc., and in this the learned author is fully supported by the very able decision of the supreme court of the United States in *New Orleans v. Morris*, 105 U. S. 600. Mr. Justice Miller, speaking for the court, says: "The learned counsel, in the oral argument and in the brief, substantially concedes that the waterworks themselves, in the hands of the city, were not liable to be sold for the debts of the city. And, if no such concession were made, we think it quite clear that these works were of a character which, like the wharves owned by the city, were of such public utility and necessity that they were held in trust for the use of the citizens. In this respect they were the same as public parks and buildings, and were not liable to sale under execution for ordinary debts against the city. * * * In the next place, the city was not situated, as regards this property, as a private person would be in the purchase and acquisition of ordinary property. The city could not have sold this property as the law stood. It could not have put it into a joint-stock company without the aid of a new law. The legislature, in authorizing the change in the form of the ownership of the waterworks, could, since it injured nobody and invaded no one's rights, say, as to the city, whether it be called new property or not, that such ownership could continue exempt from execution. As the city was using no means in acquiring this stock which could have been appropriated under any circumstances to the payment of the

debts of the appellees, the legislature impaired no obligation of the city in declaring the stock thus acquired exempt from liability for debts." This decision is important, not only as being made by the highest court of the nation, but as being the unanimous opinion of that court upon the question, and made subsequently to the decision in the *Meriweather Case*, above cited. It is clear and to the point that the waterworks of a city belong to the same class of property as "wharves, parks," etc., and holds distinctly that the waterworks property of a city cannot be sold, except by authority of the legislature, and the court says: "We think it quite clear that these works were of a character which, like the wharves owned by the city, were of such public utility that they were held in trust for the use of the citizens." The same view is taken by the court of appeals in the state of New York in the case of *City of Rochester v. Town of Rush*, 80 N. Y. 302. In that case the court says: "The argument of the appellant that the property in question would properly be exempt from a city tax, as it was procured by a tax upon property within the city, but not from a county tax, but the people of the county were not taxed to procure it, would apply with equal force to the city hall and engine houses and machines and equipments which make those houses necessary, and, if sound, would subject them to the hazard of sale under a treasurer's warrant for the enforcement of a county tax. I am unable to perceive that in any sense the waterworks can be regarded as the private property of the city, as distinguished from property held by it for public use. These considerations lead to the opinion that the property was not taxable, and that the proceedings on the part of the assessors of the town of Rush in regard thereto cannot be sustained."

The supreme court of Connecticut, in the well-considered case of *Town of West Hartford v. Board of Water Com'rs*, 44 Conn. 360, lays down the same doctrine. In that case the court says: "The introduction of a supply of water for the preservation of the health of its inhabitants by the city of Hartford is unquestionably now to be accepted as an undertaking for the public good, in the judicial sense of that term; not, indeed, as the discharge of one of the few governmental duties imposed upon it, but as ranking next in order. For this purpose the legislature invested the city with a portion of its sovereignty, and authorized it to enter within the territorial limits of West Hartford, and condemn by process of law certain lands therein for the purpose of storing water for its own inhabitants. It authorized the assessment of a tax upon property within the city of Hartford for money wherewith to pay for this land, because the taking and holding was for the public good." Having, as we think, established the proposition, that the waterworks of a city, when

constructed and owned by the city, are to be regarded the same as other city property held for public use, and therefore charged and clothed with a public trust, it would seem to follow that such property cannot be sold and conveyed by the mayor and common council of the city, unless under special authority conferred upon them to so sell and convey the same, by the legislative power of the state. Judge Dillon says, in his work before referred to, that they (municipal corporations) cannot dispose of property of a public nature, in violation of the trusts upon which it is held, and they cannot, except under valid legislative authority, dispose of the public squares, streets, or commons. See 2 Dill. Mun. Corp. § 575, and cases cited. In the recent case of *Roberts v. City of Louisville* (decided in 1891) 17 S. W. 216, the same doctrine was laid down by the supreme court of Kentucky as to the wharves held by the city of Louisville. In that case the court says: "The power of a municipal corporation to acquire land for the purpose of erecting wharves thereon, and to charge wharfage, is not a necessary incident of its charter, but must, like all its other powers, be derived directly from the legislature, of course to be exercised within the limits and upon conditions of the grant. Dill. Mun. Corp. § 110. And, looking to the nature and purpose of such special grant, it must be regarded as a trust, involving duties and obligations to the public and individuals which cannot be ignored or shifted; for the power to acquire implies the duty of the municipality, through its governing head, to maintain and preserve wharf property for benefit of the public, without discrimination or unreasonable charges for individual use. In every instance, so far as we have observed, wharf property of the city of Louisville has been acquired under act of the legislature, and paid for by taxation; and in no case is there evidence of legislative intention it should be held otherwise than in trust for use of the public, and in aid of trade and commerce. The wharf property being so held, the city of Louisville cannot transfer its title or possession, nor, according to a plain and well-settled principle, can the general council, which is by statute invested with power of control, and burdened with duty of maintaining, preserving, and operating the wharves, either delegate the power or disable itself from performing the duties." In that case the judgment of the court below dismissing the bill for an injunction was reversed, the court, in effect, holding that an injunction enjoining the mayor and common council from making the sale should be granted. In the case of *Smith v. Mayor, etc., of Nashville*, 12 S. W. 924, also a late decision made in 1890, the supreme court of Tennessee says: "It is seen at once that the waterworks are corporate property. That is not denied. The debate is with respect to the nature of the use. As

to that, for the sake of convenience, we divide all the purposes for which the city furnishes water into three classes: (1) To extinguish fires and sprinkling the streets; (2) to supply citizens of the city; (3) to supplying persons and factories adjacent to but beyond the corporate limits. If the business were confined to the first class, there would be no ground to base a decision on, so clearly would the use be exclusively for public advantage. We think there can be but little more doubt about the second class, especially in view of certain words in the city charter, to which we will advert presently. * * * Having accepted the charter, and undertaken to exercise this authority in the manner detailed by the witness, it cannot be held that the city in doing so is engaging in a private enterprise, or performing a municipal function for a private end. It is the use of corporate property for corporate purposes, in the sense of the revenue law of 1877. It can make no difference whether the water be furnished the inhabitants as a gratuity or for a recompense, the sum raised in the latter case being reasonable, and applied for legitimate purposes."

From this examination of the authorities, we conclude that there is no distinction between the nature of waterworks property owned and held by the city, and public parks, squares, wharves, quarries, hospitals, cemeteries, city halls, courthouses, fire engines, and apparatus, and other property owned and held by the city for public use. All such property is held by the municipality as a trustee in trust for the use and benefit of the citizens of the municipality, and it cannot be sold or disposed of by the common council of the city, except under the authority of the state legislature. Such property, as before stated, is private property, in the sense that the municipality cannot be deprived of it without compensation, no more than can a private corporation be deprived of its property by the law-making power. But such property is so owned and held by the municipality as the trustee of the citizens of the municipality, for the use and benefit of such citizens. It has been acquired by the corporation at the expense of the taxpayers of the city, for their use and benefit, and the law will not permit the corporation to divest itself of the trust, nor to deprive the citizens of their just rights as beneficiaries in the same.

Counsel for respondents has called our attention to a number of cases which he contends hold a contrary doctrine from those to which we have directed attention. But, after a careful examination of those authorities, we are inclined to the opinion that there is no such conflict as the counsel suggests. The leading case cited is *Bailey v. New York*, 3 Hill, 538, in which Chief Justice Nelson, in the course of the opinion, uses language, taken by itself, that possibly might be construed as favorable to the respondents' con-

tion, but it must be construed with reference to the case before the court. The questions we are now considering were not involved, the only question there being whether or not the city of New York was liable for damages caused by a defective dam erected in the construction of its water system. The views expressed by the chief justice in that case have been repudiated by the courts of New York. In *Darlington v. Mayor*, 31 N. Y. 164, the court of appeals expressly disapprove of the doctrine announced by Chief Justice Nelson. That court, on pages 200 and 201, says: "If this case of *Bailey v. New York* had rested where it was left by the supreme court, though I should be obliged to acknowledge my inability to appreciate the distinction suggested between the public and private functions of the city government, the judgment would have been entitled to a certain weight as authority. But a new trial took place, pursuant to the judgment of the supreme court, when the plaintiff recovered a very large verdict, and the case was presented to the court for the correction of errors, whose judgment of affirmance is reported in 2 Denio, 433. The chancellor and three senators delivered written opinions in favor of affirmance, and the president of the senate an opinion for reversal. None of the opinions even alluded to the ground taken in the opinion of the supreme court. * * * The liability of the defendants being established by the court of ultimate review, on an entirely different theory from that which affirmed the enterprise of conveying water into the city to be a private work, as distinguished from an act of municipal government, the doctrine of the opinion of the supreme court was substantially repudiated, and cannot, therefore, be considered as a precedent. It is but the opinion of the eminent chief justice and learned associates, and does not, like a final adjudication upon the cause of action, settle any principle of law." And that court, speaking of the question now before us, says: "The subjects of the several actions, in the cases I have been examining, were as clearly matters of municipal government as any which could be presented. Nothing could, in the nature of things, partake less of a private character than the supplying of water to and the cleaning of the streets of a town containing nearly a million of inhabitants. If these were not public subjects, and under the control of the legislature, the city is not subordinate to the supreme legislative power on any conceivable subject. It is an imperium in imperio." We have already seen that in the case of the *City of Rochester v. Town of Rush*, 80 N. Y. 302, the court of appeals of New York distinctly placed waterworks in the class of property held for public use, and therefore exempt from taxation. Georgia held that the common council of the city of Rome had power to mortgage the waterworks for money advanced for its construc-

tion. The court in that case was construing a charter in which the powers conferred upon the common council of the city of Rome were exceedingly broad and comprehensive,—much more so than those conferred upon the city of Huron as a corporation,—and they were conferred directly upon the common council itself. The decision is one of too local a character and too dependent upon the provisions of the charter to be of much weight, and so it seems to have been regarded, as it is rarely referred to by the courts; and Judge Dillon, in citing the decision, adds: "Query, as to implied power to mortgage waterworks, see *supra*, section 576, and note 577,"—thus indicating that that learned author does not regard the doctrine of the court as sound in principle. The case of *Adams v. Railroad Co.*, 2 Cold. 645, involved the sale, by the common council of the city, of some outlying lands donated to the city. The land had not been devoted to any public use, and was not held by the city in trust for public purposes. It was therefore strictly private property of the city, held like the private property of a natural person or private corporation. The decision in that case, therefore, has no application to the case at bar. The doctrine laid down in the case of *Western Sav. Fund Soc. v. City of Philadelphia*, 31 Pa. St. 175, does not seem to be applicable to this case. The contest there was between the city and a private gas company in which the city held stock. The case is somewhat complicated, and it is not easy to determine the question actually decided by the court. There is language used by the judge writing the opinion that cannot be sustained in the light of more modern authority, but we discover nothing in the decision itself that is in conflict with the doctrine that waterworks, when constructed and owned by the city, are held for public use, and therefore charged with a public trust. Our conclusion is that the waterworks in controversy were held by the city of Huron for public use, and therefore charged and clothed with a public trust, and that the mayor and common council of the city had no authority to sell and transfer the same. "Municipal corporations are created and exist for the public advantage, and not for the benefit of the officers or of particular individuals or classes. The corporation is the artificial body created by the law, and not the officers, since these are, from the lowest up to the council or mayor, the mere ministers of the corporation." 1 Dill. Mun. Corp. § 21.

The common council of the city of Huron was, to a certain extent, at least, but agent of the corporation, and possessed only such authority as was conferred upon it by its charter. While it probably possessed the power of disposing of strictly private property held by the city, and not held for public use, and therefore not charged with a trust, it did not possess the power to dispose of the city waterworks constructed by the corpora-

tion, and held for public use; and the power conferred by the first section of its charter to sell and dispose of the property of the city must be held to be limited to that class of property held as strictly private property, and not charged with any public use.

(2) Having arrived at the conclusion that the sale of the waterworks by the city council was made without authority, and was void, it becomes necessary to determine the second question presented, namely, is the city of Huron entitled to the possession of the waterworks property without refunding to the Huron Waterworks Company the money paid by it to the city treasurer as the consideration therefor, and the money expended by said company in making improvements and repairs thereon? It will be noticed, from the finding of fact in reference to the payment of the consideration, that it was paid to the city treasurer, or "into the city treasury." It is not found that the treasurer paid out the same by the order of the common council, upon any legitimate or other indebtedness of the city, or that he has appropriated it to any city purpose whatever. The act of the city treasurer in receiving the money cannot bind the city to refund it. As city treasurer, his only authority is to receive and receipt for moneys properly due the city, or that are legally paid into the city treasury. The money paid for this waterworks property did not belong to the city, and the money was therefore paid to one who had no authority, as treasurer or agent of the city, to receive it in the name of the city, and apply it in the payment of city indebtedness. The money in the hands of the treasurer did not belong to the city, and there being no finding that the city, in its corporate capacity, accepted and appropriated the money, the city is not liable to refund the same. This subject was very fully considered and discussed in *Herzo v. City of San Francisco*, 33 Cal. 134. That was an action brought to recover of the city money paid by the plaintiff for "City Slip property," the sale of which by the city had been held illegal and void. The supreme court in that case held that the plaintiff could not recover, as he had failed to show, and the court below had failed to find, that the corporation in its corporate capacity had appropriated the money paid, although it was shown that the money paid for the property had been paid into the city treasury and paid out by the treasurer on city indebtedness. The court in that case, on page 147, says: "The city, in our opinion, not being responsible for the acts of her assumed agents up to and including the placing of the money in the treasury, and the money being then the money of the plaintiff, responsibility for the money does not attach to her till she has converted it to her own use. The unauthorized act of the treasurer in paying it out to a third person is not the act of the city, and it makes no difference in this respect whether he pays it to a creditor of the city or to any other person. Suppose that he

or the secretary of the land committee, while the money was in his hands, acting upon the fact, of which all persons concerned had notice, that the sale was a nullity, had returned the money to the plaintiff, it could not be said that the act of payment was the act of the city. She could not rightfully do anything with the money, and, to be responsible for it, she must have wrongfully converted it to her own use, and this she must have done by some corporate act, and the only act competent for that purpose was an appropriation, for that is the only manner in which she can dispose of money. The reports of the secretary of the land committee and of the treasurer, and the acceptance of the reports by the common council, neither changed the ownership, the custody nor control of the money,—it still remained in the hands of the treasurer, and continued the property of the plaintiff." In the case of *Pimental v. City of San Francisco*, 21 Cal. 357, one of the same class of "City Slip cases" above referred to, the plaintiff was held entitled to recover back the money paid; but upon the ground that it was shown, not only to have been received by the city treasurer, but appropriated by the corporate authority of the city, by ordinances and resolutions. In that case Chief Justice Field, speaking for the court, on page 361 says: "The moneys paid by the bidders went into the treasury of the city, and were afterward, by different ordinances and resolutions, appropriated to municipal purposes. To the different actions, as we have mentioned, various defenses have been interposed. In some of them, as already stated, the entire transactions giving rise to or connected with the alleged sale have been treated as transactions to which the city was an absolute stranger; in other words, a want of privity, as it is termed, between the bidders and the city has been alleged. This alleged want of privity, as we understand it, amounts to this: That, inasmuch as the mayor and land committee had no authority to make the sale, they had no authority to pay the money which they had received from the bidders into the treasury of the city, and therefore no obligation can be fastened from such unauthorized act upon the city. The position thus restricted in its statement is undoubtedly correct, but the facts of the cases go beyond this statement. They show an appropriation of the proceeds, and the liability of the city arises from the use of the moneys, or her refusal to refund them after their receipt." The same doctrine is laid down in *Agawam Nat. Bank v. South Hadley*, 128 Mass. 503. In that case the court says: "But the plaintiff contends that it is entitled to recover upon the last count in the declaration for money had and received, and at the trial offered to show that the money paid or credited to the town treasurer upon the notes in suit was used by him in the payment of debts due from the town. This evidence was properly rejected. It fails to show that the money was received

by the town in its corporate capacity, or that the act of the treasurer in applying it to the payment of its debts was ever authorized or ratified by the town. The difficulty is that the money was paid to one who had no authority as treasurer or as agent of the town to receive it in the name of the town, and apply it to the payment of town debts. If a town could be held in an action for money had and received, under such circumstances, then the purpose of the second and third sections of the statute would be wholly defeated. It makes no difference that the treasurer used this specific money in payment of the town debts. There is nothing to show any appropriation of such payments by the town to its own use, or any ratification of the act. The money in the hands of the treasurer did not belong to the town." *Litchfield v. Ballou*, 114 U. S. 190, 5 Sup. Ct. 820. It would be manifestly unjust and inequitable to require the city of Huron to refund the consideration paid for these waterworks, before it can be restored to the possession of the same, be-

cause the same was paid to and received by an officer of the city unauthorized to receive it. If it had been further found by the court in this case that the city of Huron, through its proper corporate authorities, had appropriated the money so paid to the payment of the legitimate debts of the city, another question might have arisen, not necessary now to consider. But it is clear that, upon principle and authority, upon the findings in this case, the conclusions of law and the judgment should have been in favor of the city of Huron, H. Ray Myers, and Henry Schaller. The circuit court, in arriving at a different conclusion, in our opinion, committed error. The judgments of the court below are reversed, and the case remanded, with instructions to the circuit court to correct its conclusions of law in accordance with this opinion, and render the proper judgments in favor of the city of Huron, H. Ray Myers, and Henry Schaller, as prayed for in their complaint, and against the Huron Waterworks Company; and it is so ordered, all the judges concurring.

CALLON v. CITY OF JACKSONVILLE.

(35 N. E. 223, 147 Ill. 113.)

Supreme Court of Illinois. Oct. 27, 1893.

Error to Morgan county court; Owen P. Thompson, Judge.

Proceeding by the city of Jacksonville to confirm a special tax upon the land of William P. Callon. There was judgment of confirmation, and Callon brings error. Affirmed.

W. P. Callon, in pro. per. Fred H. Rowe, for defendant in error.

BAILEY, J.¹ * * * * *

It is finally insisted that the ordinance is

invalid because it provides for a purchase by the city of land outside the city limits for the purpose of extending the sewer to its outlet. In *Shreve v. Town of Cicero*, 129 Ill. 226, 21 N. E. 815, it was held that a municipal corporation has authority to extend a sewer beyond the corporate limits for the purpose of obtaining a proper outlet, and if it has that power we see no reason why it may not acquire, by purchase or otherwise, the land upon which to construct the sewer to its outlet. We are of the opinion that none of the objections urged to the judgment of confirmation in this case are well founded, and the judgment will therefore be affirmed.

¹ Part of the opinion is omitted.

STATE v. BURNS. (No. 10,954.)

(11 South. STS, 45 La. Ann. 34.)

Supreme Court of Louisiana. Jan. 2, 1893.

Appeal from recorder's court of New Orleans; Marius S. Bringier, Judge.

Thomas Burns was convicted of being an idle and disorderly person, and appeals. Reversed.

Augustus Bernau, for appellant. E. A. O'Sullivan, City Atty., and Henry Renshaw, Asst. City Atty., for the State.

McENERY, J. The defendant was prosecuted, convicted, and fined before the recorder's court, in the city of New Orleans, for violating section 1 of Ordinance No. 5046, Administration Series. He appealed.

Among the several grounds selected for attacking the ordinance, it is alleged that it is ultra vires, illegal, and unconstitutional. The ordinance is intended to punish idle persons. It prescribes the conditions which shall constitute idleness. Article 1 of said ordinance provides "that any person, being able, wholly or in part, to maintain himself or herself, or his or her family, by work or other means, and fails to do so, * * * shall be deemed an idle or disorderly person." The defendant's wife, upon whose testimony he was convicted, made an affidavit against her husband, as follows: "That on the 21st day of December, 1891, at about ten o'clock a. m., on Bolivar street, between Gravier and Perdido, in this district and city, one Thomas Burns did then and there violate Ordinance No. 5046, Administration Series, section No. 1, in this, to wit, by failing to provide for his lawful wife and children." The city attorney, in an elaborate brief, contends that the authority of the city to enact said ordinance is fully covered by the city charter of 1870, under the power granted to the city by the legislature to regulate and preserve the public peace and good order of the city, and to provide for and maintain its cleanliness and health. There can be no doubt, as stated by the learned city attorney, that the city is interested that a husband and father may not permit his wife and children to be dependent upon public charity, and, being well provided for, this tends to promote the health of the city, by inducing cleanliness, and prevents temptation to vice and crime. But the utmost latitude of construction could not vest in the city, under its charter, the power to regulate the domestic relations. There are certain moral and civil duties, the violation of which the state has not made a penal offense. Some matters of individual conduct are left to the individual conscience by the state, to which no penalty is attached for their violation. When they amount to a civil duty, means are

provided by the legislative policy of the state for their enforcement. The general policy of the state has made marriage a civil contract. To enforce the obligations resulting from it, civil remedies are provided, to which the complaining party must resort for redress. The Ordinance No. 5046, § 1, or that part of it under which defendant was convicted, is therefore inconsistent with, and in conflict with, the general policy of the state, as it has, in its general laws, regulated all the civil duties arising from the marriage contract, and has not authorized the city of New Orleans to make any change in relation thereto. 1 Dill. Mun. Corp. § 329.

The city has the power to punish idle persons or vagrants. But it must be done under the general law of the state, since the legislature has enacted one on this subject, and defines the limits of the city's powers thereunder. Section 3877, Rev. St. provides "that all idle persons, who, not having visible means to maintain themselves, live without employment; all persons wandering abroad, and lodging in groceries, taverns, beer houses, market places, sheds, barns, uninhabited buildings, or in the open air; and not giving a good account of themselves; all persons wandering abroad and begging, or who go about from door to door, or place themselves in the streets, highways, passages, or other public places, to beg or receive alms; habitual drunkards, who shall abandon, neglect, or refuse to aid in the support of their families, and who may be complained of by their families,—shall be deemed vagrants." The city ordinance cannot enlarge this statute. The laws of the state operate within the corporate limits of the city of New Orleans, and upon its inhabitants, as elsewhere in the state. The city has not been exempted from the effects of this general law. The city ordinance must conform to this statute, when punishing vagrancy, unless the vagrant is armed with picklock or other instrument, with the probable intention of committing a felony, when it must conform to section 3883, Rev. St., and following sections. It is not alleged that the defendant was an habitual drunkard, who had abandoned his family, or who refused to aid in their support. A subsequent clause in section 1, Ordinance No. 5046, conforms to this requirement of legislative policy. But the first part of said section, quoted above, under which defendant was convicted, is not embraced within the general statute of the state regulating vagrancy, and it is in conflict with the laws of the state relating to the marriage contract; and it is, therefore, illegal, null, and void. It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and the defendant discharged.

CITY OF VANCOUVER v. WINTLER et al.

(36 Pac. 278, 8 Wash. 378.)

Supreme Court of Washington. March 6, 1894.

Appeal from superior court, Clarke county; E. A. Wiswall, Judge.

Action by the city of Vancouver against A. E. Wintler, S. M. Beard, and A. J. Cook to foreclose liens for street assessments. Plaintiff obtained judgment. Defendants appeal. Reversed.

Bronaugh, McArthur, Fenton & Bronaugh, E. C. Bronaugh, and N. H. Bloomfield, for appellants. E. E. Coovert, City Atty., for respondent.

STILES, J.¹ * * * * 1. The first point made by appellants is that the general ordinance governing street assessments was void because not passed in the manner required by the statute. The law governing the passage of ordinances is contained in Gen. St. § 635, the first clause of which is: "No ordinance and no resolution granting any franchise for any purpose shall be passed by the city council on the day of its introduction, nor within five days thereafter, nor at any other than a regular meeting, nor without being submitted to the city attorney." The respondent

has deemed it important to claim, and argues at length, that the provision applies only to ordinances and resolutions granting franchises, but we think the position is untenable. It is the only provision in the act, of which it was a part, governing the matter of the passage of laws by the council; and the last clause of the section, which relates to the number of votes required to pass any ordinance, resolution, or order, clearly shows an intention to make a general application of the whole section to all ordinances, of every kind and for every purpose. But the complaint of the appellants is that, although more than five days elapsed between the introduction of Ordinance 242 and its passage, the original ordinance was not passed, but a substitute reported by the city attorney. It is a well-known practice of legislative bodies to proceed in this manner; and, so long as the substitute is clearly within the limits of the subject-matter of the original proposition, we see no reason why municipal councils should not proceed in the same way. It is a mere method of amendment, and, if the changes made are such as might have been brought about by ordinary amendments, the statute is not infringed. This was the case with the ordinance in question, and it was therefore properly passed.¹

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¹ Part of the opinion is omitted.

¹ Part of the opinion is omitted.

O'NEIL v. TYLER.

(53 N. W. 434, 3 N. D. 47.)

Supreme Court of North Dakota. Nov. 7, 1892.

Appeal from district court, Cass county; W. B. McConnell, Judge.

Statutory action by William O'Neil against R. S. Tyler to quiet an adverse title to real estate, which defendant claims by virtue of certain tax deeds. Judgment for plaintiff. Defendant appeals. Judgment setting aside the tax deeds is affirmed, and case remanded for further proceedings consistent with the opinion.

Newman & Resser, for appellant. J. E. Robinson, for respondent.

WALLIN, J.¹ * * * * * We will first consider the validity of the alleged tax of 1884, for which the city treasurer sold the property in 1885. At that time the amended charter of the city of Fargo, adopted in March, 1881, was in force. Among other provisions of the charter were the following: "Sec. 5. The powers hereby granted shall be exercised by the mayor and council of the city of Fargo as hereinafter set forth." "Sec. 8. The council of said city of Fargo shall consist of eight citizens of said city, being two from each ward, who shall be qualified electors of their respective wards, under the organic act of this territory, one of whom shall be elected president of the council at their first regular meeting after each annual election provided in section 9 of this act." "Sec. 13. All ordinances of the city shall be passed pursuant to such rules and regulations as the mayor and council may prescribe: provided, that upon the passage of all ordinances the yeas and nays shall be entered upon the record of the city council," etc. "Sec. 38. The mayor shall have power to sign or veto any ordinance or resolution passed by the city council. Any ordinance or resolution vetoed by the mayor may be passed over the veto by a vote of two thirds of the whole number of aldermen elected, notwithstanding the veto; and should the mayor neglect or refuse to sign any ordinance, or return the same with his objections in writing within ten days, the same shall take effect without his signature." Section 12 declares that the "mayor and council" of the city of Fargo "shall have power to levy and collect taxes for general purposes." Section 4 of an ordinance not pleaded, but offered in evidence, also confines the power in express terms upon the "mayor and council" to "levy the necessary taxes" on the "first Monday of

September." The answer expressly avers that the several acts pleaded by the defendant as constituting the assessment, equalization, and levy of the taxes of 1884, and embracing also the sale of plaintiff's property by the city treasurer in 1885 for such taxes, and the execution and delivery of the tax certificates and tax deed, were all and singular done and performed under and by virtue of "chapter 6 of the ordinances of the city of Fargo."

At the trial plaintiff claimed that no such ordinance existed, because the same was never legally enacted or adopted by the city council, for the reason that upon the passage of the ordinance by the council the "yeas and nays were not entered upon the record of the city council" as was required to be done by section 13 of the city charter. We think the evidence fully sustained plaintiff's contention on this point, and the trial court found it to be true, as a matter of fact, that the yeas and nays were not entered in the record of the city council upon the passage of the ordinance, and that said record contains no entry of or concerning the passage of said ordinances, except as follows: "April 19, 1881, council met pursuant to adjournment. Revised ordinances were accepted, and old ones repealed." Upon this record we are compelled to hold, under the authorities cited below, that the alleged ordinance was not legally passed or adopted, and hence never became a valid enactment. See 1 Dill. Mun. Corp. § 291, and cases cited in note 1. See analogous doctrine applied to legislation. Cooley, Const. Lim. (6th Ed.) 168; Suth. St. Const. § 48. Our attention is directed to the fact that an ordinance was adopted in 1884, which, among other things, changes the date of selling real estate for city taxes, and fixes the rate of interest on city taxes after such taxes become delinquent at a rate specified by section 1 of the original ordinance. But this later ordinance purports to be only an amendment of a single section of the original ordinance, i. e., section 3 of chapter 6, supra. Standing alone, the amendment is meaningless, and wholly incapable of enforcement. It is obvious that the amendment would not have been adopted as an independent law. Under such circumstances, the amendment must be held to be null and void. Cooley, Const. Lim. (6th Ed.) pp. 211, 212. As has been seen, the power to levy the city taxes for general purposes is, by the charter as well as by an ordinance of the city, conferred in express terms upon the "mayor and council."²

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¹ Part of the opinion is omitted.

² Part of the opinion is omitted.

PRESTON v. CITY OF CEDAR RAPIDS.
(63 N. W. 577.)

Supreme Court of Iowa. May 27, 1895.

Appeal from district court, Linn county;
J. D. Griffith, Judge.

Action to recover damages to plaintiff's property by reason of the change in the grade of the street upon which said property abuts. From a verdict and judgment against the defendant, it appeals. Reversed.

Lewis Heins, for appellant. Hubbard & Dawley and Jamison & Burr, for appellee.

KINNE, J.¹ * * * * *

4. Error is assigned upon the ruling of the court in admitting the ordinance in evidence, passed in 1875, establishing a grade on First avenue in defendant city. It is said that the yeas and nays were not called and recorded on the passage of the ordinance, and hence it was not legally passed. Code, § 493, requires that "on the passage or adoption of every ordinance, * * * the yeas and nays shall be called and recorded." The defendant city is acting under a special charter, and was never incorporated under the general incorporation laws, of which said section 493 of the Code of 1873 is a part. Nor does the law make said section applicable to cities acting under special charters: Code, § 551; Acts 21st Gen. Assem. c. 93, § 2; Acts 22d Gen. Assem. c. 14, § 2; Acts 16th Gen. Assem. c. 116, § 21. It does not appear, nor is it claimed, that the charter of defendant city requires that upon the passage of an ordinance the yeas and nays shall be called and recorded. Rule 18 adopted by said city, and which was offered in evidence by it, provides that "all votes taken on the adoption of ordinances shall be taken by yeas and nays, each member upon his name being called, unless for special reasons he be excused by the council, shall declare openly and without debate, his assent or dissent to the question." The record before us shows all of the aldermen voted for the adoption of this ordinance. Inasmuch as there was no statute or rule requiring that the yeas and nays be recorded, we do not think that the ordinance can be successfully assailed because no record was made of the vote. It is true the record does not show that the yeas and nays were called, but it does show that all of the aldermen voted for the ordinance. Under such circumstances, we may well presume that the ordinance was adopted or passed in the manner required by the rule. *Brewster v. City of Davenport*, 51 Iowa, 428, 1 N. W. 737. All of the cases cited by appellant arose in municipalities organized

and acting under the general incorporation law, and therefore are not applicable in this case.

5. Objection is made to the ruling of the court admitting the certificate of the recorder of the defendant city showing the publication of the ordinance. Section 24 of defendant's charter provided that ordinances shall be recorded in a book kept for that purpose, and shall be signed by the mayor and attested by the recorder. It also provides that the "recorder shall also certify in said record book to the publication or posting of ordinances required therein when the same shall have been published and posted." It also provides that before ordinances take effect they shall be "published in a newspaper printed in the city, at least ten days, or posted in two public places in each ward, for the same length of time." The certificate of the recorder was to the effect that the foregoing ordinance has been published, as provided by law, in the *Daily Republican*,—a newspaper published in said city. The certificate does not show the dates of publication. It appears that the ordinance was passed on February 19, 1875. It also appears that the owners of property on First avenue acted upon it in 1877 and in 1878, when they erected their buildings. It appears also that plaintiff acquired his knowledge of the fact of the passage of the ordinance of 1875 establishing a grade on First avenue from having read it in the newspapers. It appears also that when the building was erected upon plaintiff's lot the city engineer made a survey showing the grade as made by the ordinance of 1875. From these and other facts, it is fair to presume that the publication certified to was made soon after the passage of the ordinance. The ordinance introduced in this case is the original ordinance as it appears in the records of defendant city, with the recorder's certificate attached thereto. The charter of defendant required the recorder to certify in said record book to the publication. This he did. True it is that it would have been proper to have set forth in the certificate the several dates of publication, but, in view of the charter provision, we are not authorized to say that the certificate, as it appears, is not a certificate "to the publication" of the ordinance. The only matter of doubt is as to whether this publication was in fact made. We have set out facts from which we think the court was justified in holding that the ordinance was published shortly after its passage, and prior to the time plaintiff erected his building.²

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¹ Part of the opinion is omitted.

² Part of the opinion is omitted.

SWINDELL, Mayor, v. STATE ex rel.
MAXEY et al.

(42 N. E. 528, 143 Ind. 153.)

Supreme Court of Indiana. Dec. 19, 1895.

Appeal from circuit court, Marshall county;
George Burshon, Special Judge.

Mandamus, on the relation of James W. Maxey and another, against Joseph Swindell, mayor of the city of Plymouth, to compel respondent to recognize relators' claims to offices of councilmen. From a judgment for relators, respondent appeals. Reversed.

R. B. Oglesbee, W. B. Hess, and Chas. Kellison, for appellants. J. D. McLaren, Sam. Parker, C. D. Drummond, and E. C. Martindale, for appellee.

JORDAN, J.¹ The second proposition with which we are confronted is vital in its bearing upon the action of the council in passing the ordinance in controversy. The validity of the ordinance is essential or fundamental to the claims made by the relators. If for any reason it is invalid, the rights of the latter are unfounded, and the appellant would be justified in his refusal to recognize them as members of the council, and hence they must necessarily fail in the prosecution of this action. On May 26, 1873, the common council of the appellant's city duly passed and adopted an ordinance embracing a series of rules and regulations for the government of the common council in the transacting of its business, and as to the mode of proceeding in the enactment of ordinances. Some of these are merely rules of parliamentary law. Section 21 of this ordinance is as follows: "All ordinances shall be read three times before being passed, and no ordinance shall pass or be read the third time in the same meeting [that] it was introduced, provided that the council may suspend the rule by a two-thirds vote, and put an ordinance upon its passage by one reading at the time it is read." There is no question but what this rule was in full force and effect at the time of the introduction of the ordinance under consideration, and there is evidence showing that it had generally been recognized and followed by the council in the adoption of ordinances. It is the rule set up and relied upon by appellant in the second paragraph of his answer, in which it was, in substance, alleged that the ordinance upon which the relators based their claim and right to be recognized and to act as councilmen had been passed in violation thereof. During the trial the court permitted the appellant to introduce this rule or ordinance in evidence, but subsequently, before the cause was finally submitted to the jury, upon the motion of appellees, the court struck out and withdrew this evidence, over appellant's objections and exceptions; and this action of the court was assigned as one

¹ Part of the opinion is omitted.

of the reasons in the motion for a new trial. The trial court seemingly justified its action in eliminating this evidence upon the ground, as insisted by the relators, that this rule had been repealed, as the result of the motion made by Councilman Tibbetts, and carried in the manner as we have heretofore stated, and that the same was not in force when the ordinance in question was passed. The verbal motion made by this councilman, as recorded by the clerk, by which it was sought to effectually repeal the rules ordained for the government of the council, was, to say the least, somewhat indefinite. When recorded it read, "*That the rules heretofore governing the proceedings of council as printed in the ordinance book be and the same are hereby annulled and repealed.*" (The italics are our own.) Ordinances of cities are held to be in the nature and character of local laws adopted by a body vested with legislative authority, and coupled with the power to enforce obedience to its enactments. The power with which common councils of cities are invested to enact ordinances and by-laws implies the power to amend, change, or repeal them, provided that vested rights are not thereby impaired. But certainly it cannot be successfully asserted that the law will yield its sanction to the mode employed to repeal the one by which the rule in controversy was ordained and established. If the procedure by which the power of repeal was attempted to be exercised upon the occasion in question could be sustained, then all that would be necessary to accomplish the repeal of all existing ordinances of a city would be the adoption, at any regular meeting, by the common council, of a mere verbal and general motion to that effect, without any reference whatever to the title, number, or date of passage of the ordinance or ordinances intended to be repealed. In the case of *Bills v. City of Goshen*, 117 Ind. 221, 20 N. E. 115, it was held by this court that a defect in an ordinance could not be cured or amended by means of a motion subsequently made by a member of the council, and put to a vote and carried. In *Horr & B. Mun. Pol. Ord. § 61*, it is said: "Express repeals can only be effected by an act of equal grade with that by which the ordinance was originally put in operation. No part or feature of an existing ordinance can be changed by a mere resolution of the council, even though signed by the mayor and recorded. A new ordinance must be passed." See, also, sections 63, 64, same authority. In *Jones v. McAlpine*, 64 Ala. 511, an attempt was made, by a motion, to raise or change the license fee in a certain ordinance by the mayor and board of aldermen of the city of Talladega. This method was held to be ineffectual in its results. The court said: "Until an ordinance had been adopted by the mayor and aldermen changing the ordinance of May 9, 1887, * * * that ordinance remained in full force, though there was an intention to change it, and a

declaration of the will of the board that it should be changed."

Considered, then, in the light of the authorities which we have cited, and the manifest reason which necessarily underlies and sustains the rule which they assert, the conclusion is irresistibly reached that the attempt to repeal the ordinance which embraced the series of rules and regulations in question, by the action of the council in adopting the motion in controversy, was ineffectual, and did not result in the repeal or abrogation of the rule under consideration. Having reached this conclusion, the inquiry arises as to the effect of the operation of this rule upon the ordinance upon which the relators found their claims, and which was passed and adopted, as it appears, by the council, in violation of its provisions. It is said in Dill. Mun. Corp. § 2888: "After a meeting of the council is duly convened, the mode of proceeding is regulated by the charter or constituent act, or by ordinances passed for that purpose, and by the general rules, so far as in their nature are applicable, which govern other deliberative and legislative bodies." In section 47, Horr & B. Mun. Pol. Ord., it is said: "The usual statutory direction is that every ordinance shall be read at three different meetings before its final enactment. The direction is necessary, as a safeguard against too hasty legislation, and its observance mandatory. If neglected, the ordinance is ab initio void." In Beach, Pub. Corp. § 494, it is said: "The mode of enacting the ordinance is generally prescribed in the charter or an ordinance, and their requirements should be strictly complied with. So, where the charter prescribes that no by-law shall be passed unless introduced at a previous meeting, the provision has been held to be mandatory, and a by-law passed in violation thereof is void." In the case of Horner v. Rowley, 51 Iowa, 620, 2 N. W. 436, the question arose as to the validity of a town ordinance authorizing the issuance of a license for the sale of wine and beer. It appeared that the council that adopted the ordinance involved in that case consisted of seven members. The statute of the state provided "that ordinances of a general or permanent nature shall be fully and distinctly read on three different days, unless three-fourths of the council shall dispense with the rules." Upon a motion to dispense with the reading required under the rule, four members voted in the affirmative, and none in the negative. The mayor decided the motion carried, and the ordinance was adopted. The court said: "As four, the number who voted to suspend the rule and pass the ordinance, is not three-fourths of seven, it follows that the ordinance was not legally enacted. It was therefore void, and no valid act could be done under its provisions." The statutes of Ohio relating to cities require that ordinances of a permanent nature shall be read on three different days, unless three-fourths of the mem-

bers of the council dispense with the rule. In the appeal of Campbell v. City of Cincinnati, 49 Ohio St. 463, 31 N. E. 606, it was held that this provision was mandatory, and that, in passing several ordinances "in a lump," it was requisite to suspend the rule as to each, in order to render its final adoption legal and valid. In considering the question therein involved, the court, per Dickman, J., said: "But municipal corporations act, not by inherent right of legislation, like the legislature of a state. * * * They are the creatures of the statute, invested with such power and capacity only as is conferred by the statute, or passes by necessary implication from the statutory grant, and their powers must be strictly pursued. Cooley, Const. Lim. (6th Ed.) 227; Williard v. Killingworth, 8 Conn. 247; Ex parte Frank, 52 Cal. 606. The rule, therefore, as stated in numerous adjudged cases, is that the mode of procedure to be followed in the enactment of ordinances, as prescribed by statute, must be strictly observed. Such statutory powers constitute conditions precedent, and, unless the ordinance is adopted in compliance with the conditions and directions thus prescribed, it will have no force. 17 Am. & Eng. Enc. Law, 238, and cases cited. In Clark v. Crane, 5 Mich. 151, the supreme court laid down the rule that 'what the law requires to be done for the protection of the taxpayer is mandatory, and cannot be regarded as merely directory.' The requirement that ordinances * * * shall be fully and distinctly read upon three different days is designed as a safeguard against rash and inconsiderate legislation; and, being in a great degree essential to the protection of the rights of property, it should be deemed a mandatory measure, intended as a security for the citizen." The case of State v. Priester, 43 Minn. 373, 45 N. W. 712, asserts the same rule, and the reasons therefor. This court, in the appeal of the City of Logansport v. Crockett, 64 Ind. 319, held that section 3534, Rev. St. 1894 (section 3099, Rev. St. 1881), which requires that on the adoption or passage of any by-laws, ordinances, or resolutions, the yeas and nays shall be taken and entered on the record, was mandatory, and that a noncompliance with this provision rendered the adoption of the ordinance nugatory. See Dill. Mun. Corp. § 291.

It is not necessary that we should further extend the consideration of the question, or refer to additional authorities to show that, when the legally prescribed method of procedure in the enactment of an ordinance is neglected or violated, the latter is thereby rendered invalid and of no force or effect. This doctrine or principle seems to be firmly settled by many leading authorities and decisions. The inquiry then is: Is the same principle applicable when the procedure is one prescribed by an ordinance of the common council enacted under the exercise of the power granted by the legislature? There

is no statute in this state that embraces or contains the provisions or requirements in regard to the passage of an ordinance by the common council that are contained in section 21 of the ordinance in question. This right to regulate such proceedings in this particular respect seems to have been committed by the legislature to the common council. Section 3533, Rev. St. 1894 (section 3098, Rev. St. 1881), among other things, provides that "the common council may by ordinance prescribe such rules and regulations, in addition to those herein contained, for the qualification and official conduct of all city officers, as they may deem for the public good, and which shall not be inconsistent with the provisions of this act." By section 3616, Rev. St. 1894 (section 3155, Rev. St. 1881), it is further provided, in addition to the powers expressly granted, that the common council shall have power to make other by-laws and ordinances not inconsistent with the laws of the state, and necessary to carry out the objects of the corporation, etc. By these provisions, plenary powers are given to the council to pass and adopt ordinances prescribing rules and regulations, not inconsistent with law, for its government and control, when duly convened and acting officially, in regard to its proceedings upon the passage of an ordinance or otherwise. We have seen, by some of the leading authorities which we have herein cited, that when the mode of proceeding upon the part of the council in the adoption of an ordinance is regulated either by the charter, or an ordinance enacted thereunder, this prescribed mode must be strictly followed. Ordinances of a city, duly enacted, are in the nature of laws; being the decree or will of the common council, which body is vested with legislative authority. Public policy demands and authority sanctions the delegation of various powers of local legislation to this municipal body. The ordinances enacted in the exercise of these powers have, within the corporate limits of the city, the force of laws. They are held by the courts to be, within these limits, as binding as the laws of the state and general government, and are enforced in a similar manner, and under like rules of construction. When an ordinance is duly and legally passed, under the warrant of the legislature, it is in force, by the authority of the state. *Horr & B. Mun. Pol. Ord. § 2*; *Beach, Pub. Corp. §§ 482, 486*. A by-law or ordinance which a municipal corporation is authorized to adopt is as binding on its members and officers, and all other persons within its limits, as a statute of the legislature. *Heland v. City of Lowell*, 3 Allen, 407; *Pennsylvania Co. v. Stegemicer*, 118 Ind. 305. 20 N. E. 843, and authorities cited; *Tied. Mun. Corp. § 153*; *Dill. Mun. Corp. §§ 307, 308*. In *Milne v. Davidson*, 5 Mart. (N. S.) 586, a contract entered into in contravention of an ordinance of the city of New Or-

leans was held to be void. The court said: "The ordinances of a corporation, while acting within the powers conferred upon them by the legislature, have as binding an effect on the particular members of that corporation as the acts of the general assembly have on the citizens throughout the state, and it is as much a breach of duty to evade or violate the one as it would be to evade or violate the other. The moral and legal obligation to obey them is the same, and the consequences of nonobedience ought to be the same."

These many authorities, which substantially enunciate and sustain the proposition that a municipal ordinance is a local law or statute, upon which rests both the moral and legal obligation to obey of all persons subject thereto, and that the results of a non-compliance with the mandatory or prohibitory provisions thereof must, in reason, be the same, in effect, as follow the disobedience or disregard of an act of the legislature of like import, warrant the conclusion and holding that when the charter law of a city does not regulate the mode of procedure to be observed upon the adoption of an ordinance by the council, but has committed the authority or power so to do to that body, which, in pursuance thereof, has prescribed by ordinance an essential and salutary rule, mandatory and prohibitory in its provisions, as is the one under consideration, the council must yield to it their obedience, and, in the enactment of an ordinance, must be controlled thereby, unless suspended in the manner or by the vote provided, and that the consequences of refusing to substantially comply with its provisions, or a violation of its inhibition, must, in reason, be the same as the noncompliance with or a violation of a requirement prescribed by the statute. The section of the ordinance in question prescribed, substantially, that "all ordinances shall be read three times before being passed. No ordinance shall pass or be read the third time at the same meeting in which it was introduced." The word "all" may mean "every," and is to be construed in this connection. *Bloom v. Xenia*, 32 Ohio St. 461. We may therefore read the rule thus: "Every ordinance shall be read," etc. The first clause is mandatory, and the second prohibitory. Such a rule prescribed for the government of legislative bodies is recognized by the courts as a salutary one. It is a check upon what sometimes might prove to be ill-advised, prematurely considered, or pernicious legislation. If a common council were permitted to willfully ignore, utterly disobey, and violate an ordained rule of this character, injurious results to the inhabitants of the corporation might, and possibly would, result. It is therefore the duty of courts to require a strict compliance with mandatory provisions of the law, of the character and purpose of the one in question. A two-thirds vote of the council was requir-

ed, to suspend the rule. This, in reason at least, must be construed and held to mean not less than two-thirds of all the members present at any meeting of the council. *Atkins v. Phillips*, 26 Fla. 281, 8 South. 429. It appears from the record that the acts of the council antecedent to and including the final passage of the ordinance creating the ward in controversy only received the votes of, and were sanctioned by, three of the six councilmen present at the meeting. Three cannot be held to be two-thirds of six. Hence, in no manner, or upon any view of the case, was a suspension of the rule effected. Viewed then, in the light of the reason and logic of the authorities herein cited, we are constrained to hold and adjudge that, the ordinance having been passed in non-compliance with and in violation of the ordained rule in controversy, it is invalid and inoperative, and that the action of the council based thereon, in appointing the relators, is likewise void, and consequently the latter cannot successfully maintain this action. *City of Logansport v. Legg*, 20 Ind. 315. Appellant was entitled to expose, by facts, sufficiently in his answer, the invalidity of the relators' appointment, and to prove the same by evidence upon the trial. While, perhaps, the second paragraph of the answer or return contained some irrelevant or imperti-

nent facts, that might have been eliminated upon motion, still the facts alleged as to the ordinance's having been adopted in disregard and violation of the rule in question were pertinent and material in defense of the action, and the paragraph ought not to have been suppressed. *Atkinson v. Railroad Co.* (at last term) 41 N. E. 947. We must not be understood as holding by this opinion that the nonobservance of mere technical rules of parliamentary law, which are employed for convenience in governing the action of common councils, would result in rendering an act of such bodies, otherwise valid, invalid, but our holding is confined to the particular rule under the circumstances and facts in question.

From the conclusion we have reached, it follows that the trial court erred in striking out the second paragraph of the answer, and also in holding that the rule had been repealed by the motion as made, and the judgment cannot be sustained. It is therefore reversed, and the cause is remanded, with instructions to the lower court to vacate its order awarding the peremptory writ of mandate, and to overrule the motion to strike out the second paragraph of appellant's answer, and grant him leave, if requested, to file an amended one, and for further proceedings in accordance with this opinion.

Note. Professor Goodwin maintains that the case is not good law — that a city council is not bound by its own ordinance in the passing of an act.

CITY AND COUNTY OF SAN FRANCISCO
v. BUCKMAN. (No. 15,897.)

(43 Pac. 396, 111 Cal. 25.)

Supreme Court of California. Jan. 14, 1896.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by the city and county of San Francisco against A. E. Buckman to restrain him from digging into, tearing up, or in any way obstructing, the roadway of Market street, in said city. From an order denying his motion for a new trial, defendant appeals. Affirmed.

Wm. H. Chapman, for appellant. H. T. Creswell, for respondent.

BELCHER, C. This is an appeal from an order denying the defendant's motion for a new trial. The action was brought to obtain a decree restraining the defendant, his agents, servants, and employés, from digging into, tearing up, or in any way interfering with, the roadway, roadbed, sidewalks, or grade of Market street, between the points of its junction with Valencia street and Seventeenth street, in the city and county of San Francisco. The defendant, by his answer, admitted that he had commenced, with a large force of men, to grade a portion of Market street between the points named; and, to justify his right to do so, he set up an order (No. 2,318) passed by the board of supervisors of said city and county in December, 1890, "changing and establishing grades on Market street, southwesterly from Valencia street," and a resolution (No. 4,498, third series) passed by the said board in January, 1891, granting permission to certain property owners on Market street, between Valencia and Seventeenth streets, to grade said street in front of their property to the center line thereof. And he alleged that under a contract with the said property owners, and a permission duly obtained from the superintendent of streets, he was proceeding to grade the street to the official grade, for and on behalf of the property owners, and was lawfully performing said work, when restrained by the order of the court below. The case was tried, and the court found that, at all the times mentioned, Market street was, and still is, one of the public streets of the city and county of San Francisco; that at the time of the commencement of the action the defendant was engaged, with a large force of men in his employment and under his control, in digging, tearing up, removing, and otherwise destroying and obstructing, the roadway of said street, between Valencia and Seventeenth streets, in such a manner as to obstruct the free passage and use of the same, and to destroy the roadway thereof for the use and purposes of a street and thoroughfare, and threatened to continue said acts; that all of said acts of defendant were done without the consent or permission of plaintiff, or any of its officers or

agents, and contrary to the express commands of plaintiff; and, as conclusions of law, that the said acts of defendant constitute a public nuisance, and plaintiff is entitled to a writ of injunction to restrain the further continuance thereof. A decree was accordingly entered granting the plaintiff the relief prayed for.

The principal question presented for decision is, were the findings of the court justified by the evidence? It was proved on behalf of the plaintiff that on July 26, 1887, an order (No. 1,924) was passed by the board of supervisors establishing the grade of Market street between Valencia and Seventeenth streets, and it was admitted by defendant that, prior to the passage of order No. 2,318, the said street had been graded to the official grade as so established. It was further proved that resolution No. 4,498 (third series) was never passed to print, but was introduced at a meeting of the board held on January 2, 1891, and was then and there, on a vote taken by the board, declared to be adopted, and no other or further action thereon was ever taken, and also that on February 2, 1891, a resolution (No. 4,672, third series) expressly repealing resolution No. 4,498 was adopted by the board. It was also proved that on January 19, 1891, an order (No. 2,388) expressly repealing order No. 2,318 was passed by the board. The general street law of 1885, as amended in 1889 (St. 1889, p. 157), contains very full and complete provisions for work upon public streets. The general rule is that the work is to be done by contract, and to be paid for by assessments of the expense upon the adjoining property owners, in the proportions fixed by the statute. The only exception to this rule is found in subdivision 10 of section 7 of the act, whereby it is provided that "it shall be lawful for the owner or owners of lots or lands fronting upon any street, the width and grade of which have been established by the city council, to perform at his or their own expense (after obtaining from the council permission so to do, but before said council has passed its resolution of intention to order grading inclusive of this) any grading upon said street to its full width, or the center line thereof, and to its grade as then established," etc. And in section 68 of the consolidation act it is provided that "every ordinance or resolution of the board of supervisors, providing for any specific improvement, the granting of any privilege * * * shall, after its introduction in the board, be published, with the ayes and nays, in some city daily newspaper at least five successive days before final action by the board upon the same," etc. Worley's Consolidation Act, p. 16. From the foregoing provisions of the statutes, it is evident that the owners of lots fronting on Market street had no right to proceed to grade the street, or to contract with any one else to grade it, until after they had obtained permission from the board of supervisors to do so, and that such permission was a privilege, which could only be granted in the mode prescribed, namely, after publication for at least

five days. It must follow, therefore, as resolution No. 4,498 was never published, that it never became operative, or authorized the lot owners to grade, or in any way to disturb, the street, in front of their premises, and that their

contract with appellant to do work which they had no right to do was void and of no effect.¹

* * * * *

¹ Part of the opinion is omitted.

STATE (NORTH BAPTIST CHURCH, Prosecutor) v. MAYOR, ETC., OF CITY OF ORANGE.

(22 Atl. 1004, 54 N. J. Law, 111.)

Supreme Court of New Jersey. Nov. 5, 1891.

Certiorari, at the prosecution of the North Baptist Church, to the mayor and common council of the city of Orange, to inquire into the validity of an ordinance of that city relative to the opening of a street, and to bring up all proceedings under such ordinance. Ordinance set aside.

Before DEPUE, DIXON, and REED, JJ.

Colie & Titsworth and J. D. Bedle, for prosecutor. Charles F. Lighthipe, for defendants.

REED, J.¹ * * * * *

There are, however, irregularities which we are constrained to regard as fatal to the present ordinance. These irregularities are to be found in the manner in which the notice of the proposed improvement, as well as the manner in which the ordinance, after its passage, were printed. The charter (P. L. 1869, p. 212, § 61) requires that public notice of the contemplated improvement shall be given by publishing a copy of the proposed ordinance, and that the said notices shall state the time and place of the meeting of common council at which they will proceed to consider the said ordinance. A supplement to the charter (P. L. 1873, p. 461, § 5) requires that these notices shall be published in all three of the newspapers published at that time in the city of Orange. One of these papers was then, and still is, printed in the German language. The notice of the time and place when the present ordinance would be considered was printed in this paper, as it was in the other two papers, in the English lan-

guage. This, we think, was a mistake. The primary meaning of the word "publish" is to "make known." The medium through which intelligence is communicated in a German newspaper is the German language. The object to be attained by including such papers in the class of publications is to bring knowledge home to a body of readers by whom, as a rule, the English language is not readily or not at all legible. A notice contained in a German newspaper in a language other than the German is not published, but only printed. Again, the charter requires all ordinances, after their passage, to be published in the same three papers. This ordinance was published in a German translation only. I think this was also a mistake. There is a manifest distinction to be observed between the publication of a notice and the publication of an instrument or statute or ordinance. A notice requires no particular collocation of words, so long as it conveys a clear notion of its subject; but a statute or ordinance has no legal existence except in the language in which it is passed. No translation, however accurate, can be adopted in the place of its original text, for the purposes of construction in a legal proceeding. Until the legislature makes a provision for the printing of ordinances in German newspapers in translation, it is not perceived how they can be printed otherwise than *litera et verbis*. The publication of the translation may be regarded as a proper explanatory adjunct of the English copy, but cannot be accepted as a legal substitute for it. This view of the manner in which an ordinance should be printed under these conditions applies in some degree to the notice also. As already set forth, the charter requires that, as part of such notice, a copy of the proposed ordinance shall be published. For the reasons already stated this copy should appear in English. The ordinance must be set aside.

¹ Part of the opinion is omitted.

CITY OF HAMMOND v. NEW YORK, C. &
ST. L. RY. CO.

(31 N. E. 817, 5 Ind. App. 526.)

Appellate Court of Indiana. Sept. 30, 1892.

Appeal from circuit court, Porter county;
H. A. Gillett, Special Judge.Action by the city of Hammond against the
New York, Chicago & St. Louis Railway Com-
pany to recover a penalty. From a judgment
in favor of defendant, plaintiff appeals. Re-
versed.S. Griffin and E. D. Crumpacker, for appel-
lant. Bell & Morris, for appellee.

FOX, J.¹ * * * * A cross error has been assigned by the appellees, "that the court erred in its first conclusion of law, which, on the facts found, should have been that said ordinance was invalid, and not in force and effect." The judgment that we have concluded to render in this case makes it necessary for us to consider the cross error assigned. This we will do in the outset. This presents the question, was the ordinance invalid for the reason that it was not properly signed, attested, and recorded? Concerning "by-laws and ordinances" enacted by the common council of cities, section 3099 of the Revised Statutes of 1881 (section 3534, Rev. St. 1894), provides as follows: "3099 [3534] All by-laws and ordinances shall, within a reasonable time after their passage, be recorded in a book kept for that purpose, and shall be signed by the presiding officer of the city, and attested by the clerk. On the passage or adoption of any by-law, ordinance, or resolution, the yeas and nays shall be taken, and entered of record." It can well be inferred that the reason for the enactment of this statute and the purpose to be accomplished by it was to remove all uncertainty as to the identity of ordinances in force in a city, as well as to furnish proper and unmistakable evidence of their contents. For this purpose the statute requires that all ordinances shall be signed by the presiding officer of the city and attested by its clerk, and be recorded "in a book kept for that purpose." It is a matter of common knowledge, in which the court must be held to share, that in a common council of a city, as in other legislative bodies, "bills" are prepared and introduced by the individual members, and, as a usual thing, are written upon separate and detached pieces of paper. When the "bill" is under consideration it is subject to change and modification by amendment. When it is "passed" it becomes an ordinance, and, as such, goes into the hands of the clerk, to be by him placed on file in his office. If left in the condition in which it is when it goes into his hands, and nothing further is done with it, it would contain no evidence upon its face that it was a perfect ordinance. No other evidence of its contents than the original

paper would be in existence. To obviate all this, the statute requires that it shall be signed, attested, and recorded. When this is done, its identity as an ordinance is fixed, and perfect evidence of its contents furnished, easy of access to all concerned. But how shall this signing, attesting, and recording be done? Was there a substantial compliance with the provisions of the statute in this case?—are the questions to be answered. Counsel for appellee say in their brief that "this question has been squarely decided" in the case of *Bills v. City of Goshen*, 117 Ind. 221, 20 N. E. 115. We have read that case with some care. If it "squarely decides" the questions involved in the case before us, as counsel contend, then the matter is settled, as far as this court is concerned, for we have no power to "directly or by implication reverse or modify any decision of the supreme court." But we do not so understand that case. The question there involved was essentially different from the one involved here. In that case the question as to whether the ordinance set forth in the opinion had been signed, attested, and recorded or not was not before the court. The real point was that the ordinance in question did not fix the amount of license fees sought to be charged against the defendant, and an attempt was made by the common council to supply the omission by an ordinary motion made by "Councilman Drake." This, it was very properly held, could not be done. In the course of the opinion, Olds, J., says, in speaking of the legality of an ordinance: "The statute requires it to be signed by the presiding officer, and attested by the city clerk, and recorded; and, having vested the power in the city, to be exercised in a certain way, it cannot be exercised other than as provided by statute." An examination of this case will show that the questions decided by the court will not furnish us with any light whatever in the case before us. The court, in its special finding, states the fact to be that the ordinance "was spread of record at length, and recorded in the minutes of said council proceedings, in a book kept for that purpose," and that the minutes so containing a record of the ordinance "were signed by the presiding officer, and attested by the clerk; * * * that all the ordinances of said city were recorded in the minute book of council proceedings, and plaintiff had no other book containing records of ordinances." The record of the meeting in which the ordinance "was spread at length" showed upon its face that it was a continuous one, and only contained the minutes of the proceedings of a single meeting. The signing thereof by the presiding officer and the attestation of the clerk were equivalent to signing each particular order, resolution, or ordinance contained therein, severally. The minutes so entered certainly constituted a record. All the ordinances of the city were so recorded, and not otherwise, for no other book was kept or

¹ Part of the opinion is omitted.

made for that purpose. Considering the subject and object of the statute, we think there was a substantial compliance with the spirit of its provisions, and that the ordinance was to all intents signed, attested, and recorded. The case of *Upington v. Oviatt*, 24 Ohio St. 232, is very much in point. It was there held

that a statute requiring ordinances of municipal corporations to be recorded "in a book kept for that purpose" is directory only, and that recording an ordinance in the "journal of the council" was sufficient.² * * * *

² Part of the opinion is omitted.

COLUMBUS GASLIGHT & COKE CO. v.
CITY OF COLUMBUS.

(33 N. E. 292, 50 Ohio St. 65.)

Supreme Court of Ohio. Jan. 24, 1893.

Error to circuit court, Franklin county.

Action by the Columbus Gaslight & Coke Company against the city of Columbus. Plaintiff had judgment, which was reversed by the circuit court, and plaintiff brings error. Affirmed.

R. H. Platt, for plaintiff in error. Paul Jones and Florizel Smith, for defendant in error.

SPEAR, C. J. The single question is as to the sufficiency of the petition. If that states a cause of action, the judgment of the circuit court should be reversed; if not, the opposite result follows. It will be noted that there is no direct allegation that the grant from the city gave the company the right to maintain its pipes at any particular place in the street, nor at any prescribed depth beneath the surface. Nor is it averred that the action of the city was in any way wanton, nor that the change of the grade of the street was unnecessary; and the presumption is that the city acted, in that behalf, lawfully, and without negligence. Nor is it pretended that the city has denied the company's right to maintain its pipes in Broad street. The dispute involves only the right to maintain them where first laid.

The company's claim is that, while the consent of the city must first be obtained, the city having the right to make reasonable regulations as to the terms and conditions on which the company may occupy, yet, when the city has given its consent, has made the grant, the right in the streets is in the nature of an easement, which then belongs to the company by force of the statute, and the city cannot interfere with that right, save upon condition of awarding compensation for resulting damage. It is freely conceded that the company is a public agency. It is further conceded that the use of streets and alleys for gas pipes, through which gas is to be conducted for the use of the city and its people, is a recognized public use and purpose, and that the general right to so lay and maintain such conductors is created by statute. This is, however, upon condition of consent by the municipal authorities, and under such reasonable regulations as they may prescribe. And cities are specially authorized to provide for the laying down of gas pipes. But, while all this is conceded, it must always be kept in mind that the primary use of the streets is not for the laying of gas pipes. That is but an incidental—a secondary—use. Above all other uses is the accommodation of the public travel. Our statute (section 2640) prescribes the city's duty thus: "The council shall have the care, supervision, and control of all public highways, streets, avenues, * * * within the corporation, and

shall cause the same to be kept open and in repair, and free from nuisance." This necessarily implies the duty, as well as the right, to grade, in order that the streets may be accessible, convenient, and in good repair. It also implies that the duty as well as the right is a continuing one. The duty is not to open the streets and put them in repair, but to keep them open and in repair. This matter of grading is not, necessarily, a single operation. The duty of exercising the power anew, therefore, follows the changing conditions and needs of the public. The power is a legislative one. It is to be enforced by ordinance. The council is to perform the duty, and it is elementary, we suppose, that the council cannot, in the exercise of legislative powers, bind its successors, unless authority from the state to do so is clearly indicated. The corporation cannot abridge its own legislative power. It would follow from this that in prescribing regulations, or annexing conditions, by the city, to the exercise by a gas company of a right in a street to enjoy the same for this secondary use, the council has not the authority to cede away nor bargain away the right of the city to perform its public duties, especially as to a primary use of its streets, nor to abridge the capacity of its successors to discharge those duties, unless some express provision of statute is found to that effect, and that is not claimed. The power to regrade, and the duty of exercising the power under proper conditions, being established, does liability for damage follow its exercise in such a case as the one at bar? If it can be maintained that the company has acquired an easement giving it the right to continue its pipes at the particular place in the street where they were placed, there would be strong reason for concluding that liability for damage would follow their disturbance by the process of grading; otherwise not.

It is insisted that the easement of the company, acquired by the grant from the city, is a right as substantial as that of an abutting owner, and that its right to compensation for interference with pipes laid in conformity with an established grade is as well founded as that of an owner of abutting property to compensation for an interference arising in the same way. There are some points of similarity between the two situations, but we think there are more differences. The street is often dedicated by the owner, or his predecessor in title, to public use, and, if acquired by appropriation, he is liable to compulsory contribution for payment of land taken. By reason of owning the abutting land, he has a property right in the street itself, as much property as his lot. Under some circumstances, trees growing in the street in front of his lot are his property, and he may maintain them there, subject only to the free use of the street by the public. In case of abandonment, the title to the middle of the highway itself ordinarily reverts to him. Among other rights is that of access to and from his premises; and where

he has improved in conformity with an established grade, the damage occasioned by a material change of grade is immediate, and often serious. A marked difference between the two rights is found in their origin. In no single particular does the landowner get any property right in the street from the city. No consideration of the city's power is brought in question in estimating the character of the lot owner's right in the street. It inheres in the very ownership of the lot, as an incident to it. None of these characteristics attach to the company's easement. In no sense is it the owner of land adjoining the highway. A fair construction of the petition makes of it no more than a naked right to place and keep its pipes somewhere in the street; and this, we think, is the extent of the council's power. An ordinance to grant an exclusive right or a perpetual right to occupy a particular part of the street would be an attempt to bind succeeding councils as to their exercise of legislative power, and would, for reasons stated, be ineffectual. The grant by the city must be interpreted in the light of the right and duty of the city to regrade, whenever in its judgment the public interest demands; and whatever easement the gas company can receive, it must accept and enjoy in common with equivalent rights which have been or may be acquired by other public agencies,—rights of a like secondary character; and all must give way to the paramount duty of the city to care for the

streets, and keep them open, in repair, and convenient for the general public. This duty would be seriously interfered with if the city could not change the grade of its streets save upon the condition that it should make compensation to every gas company, and water company, and telephone company, and electric light company, and street-railway company, for inconvenience and expense thereby occasioned. All such agencies must be held to take their grants from the city upon the condition, implied where not expressed, that the city reserves the full and unconditional power to make any reasonable change of grade or other improvement in its streets.

Attention has been called to some authorities which seem to give sanction to the company's claim in this case, but we are impressed that they do not, in this respect, express the spirit of our statutes and decisions. On the other hand, counsel for the city have cited authorities which support the conclusions here reached. See *Dill. Mun. Corp. hic et ibi*; *Lewis, Em. Dom.* §§ 107, 109; *Goszler v. Corporation of Georgetown*, 6 Wheat. 593; *City of Brenham v. Brenham Water Co.* (Tex. Sup.) 4 S. W. 143; *Aqueduct Corp. v. Brookline*, 121 Mass. 5; *In re Deering*, 93 N. Y. 361; *Waterworks v. Kansas City*, 28 Fed. 921; *Rockland Water Co. v. City of Rockland*, 83 Me. 267, 22 Atl. 166. We think the petition does not state a cause of action.

Judgment affirmed.

STATE v. MAHNER et al. (No. 10,730.)

(9 South. 480, 43 La. Ann. 496.)

Supreme Court of Louisiana. April 13, 1891.

Appeal from recorder's court of New Orleans; J. U. Landry, Judge.

A. D. Henriques and Branch K. Miller, for appellants. Henry Renshaw, Asst. City Atty. (Carleton Hunt, City Atty., of counsel), for the State.

McENERY, J. The defendants were prosecuted for violating ordinance No. 3414 of the city of New Orleans, convicted, and fined. This ordinance and amended ordinance No. 3175 extended the limits within which dairies were prohibited. The defendants ask that the ordinance be declared null and void, because it is not general in its operation, is unconstitutional and oppressive. The objectionable feature of the ordinance is contained in the first section. This section prescribes the limits within which dairies may be conducted by permission of the city council, and it is made unlawful to keep more than two cows without a permit from the city council. The defendants are within the prohibited limits, and keep more than two cows. The ordinance is not general in its operation. It does not affect all citizens alike who follow the same occupation which it attempts to regulate. It is only those persons who keep more than two cows in the prohibited limits, without the permission of the city council, who are subjected to the penalties in the ordinance. The discretion vested by the ordinance in the city council is in no way regulated or controlled. There are no conditions prescribed upon which the permit may be granted. It is within the power of the city council to grant the privilege to some, to deny it to others. The discretion vested in the council is purely arbitrary. It may be exercised in the interest of a favored few. It may be controlled by partisan considerations and race prejudices, or by personal animosities. It lays down no rules by which its impartial execution can be secured, or partiality and oppression prevented. *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064; *Horr & B. Mun. Ord.* §§ 135, 136. It was the evident intention of the council, in amending ordinance 3175, to prohibit dairies in other places than within the prescribed limits. The amended ordinance (section 3) grants 12 months' time to the proprietors or owners of all dairies now in existence, in violation of the amended ordinance, to move their dairies. But, as the amendment to the ordinance only extends the limits within which dairies are prohibited, those who have them in pursuance of the permission from the mayor are exempt from its operations. Section 4 of ordinance 3414 is open to the objections above stated. It is as follows: "That henceforth no new dairies

keeping more than two cows shall be established within the limits above named, under the same penalties as are now in force under existing ordinances." This section establishes an inequality, granting to some persons, following the same occupation, privileges that are not extended to others. The ordinances do not regulate dairies in the interest of the public health. One dairy may be a nuisance because the city council has refused to give the required permission for its establishment; another may be perfectly harmless, and in no way detrimental to public health, because it exists by permission of the council. They may exist alongside of each other, both unobjectionable in their police regulations, and one a nuisance and the other a lawful establishment. Both the original and amended ordinances violate equal rights among the class they are designed to affect, and are therefore necessarily void, so far as they do so. This opinion in no way conflicts with the views expressed in the case of *State v. Gisch*, 31 La. Ann. 544. In that case the ordinance regulated private markets in pursuance of express legislative enactment, by imposing a license upon them when they were conducted in certain localities. The ordinance affected all persons alike who were engaged in the same occupation, and was free from the objections in the ordinances under consideration. Nor does this opinion conflict with the opinion and decree in the case of *Bozant v. Campbell*, 9 Rob. (La.) 411, in which the court was called on to deal with a municipal ordinance prohibiting the establishment of private hospitals within certain limits. The court held that, as the council had a right to repeal the ordinance, it could do so partially, and modify it so as to permit, in exceptional cases, the erection of private hospitals within the prohibited limits. The instant case does not present the same features. In the exercise of its powers in the interest of the public health, the court said the council of the municipality had prudently exercised it. It is therefore adjudged and decreed that the judgment appealed from be annulled, avoided, and reversed, and the suit of the city against the defendants be dismissed, with costs of both courts.

On Rehearing.

(April 27, 1891.)

The city attorney asks for a rehearing in this case. In the brief for the rehearing the city attorney says: "But should your honors determine that the question involved herein is to be determined upon a possible instead of an actual case, we respectfully submit that your honors' decree should go no further than to declare null the clause providing for previous permission from the city council." We cannot conceive of a more actual case for determination than one wherein the defendant has been tried, con-

victed, and sentenced for the violation of the ordinance under consideration. The ordinance made it an offense for keeping a dairy within prohibited limits without permission from the city council. We did not consider the right or power of the city to prohibit dairies within the city limits. This power is undoubted, when exercised in the interest of the public health. We distinctly asserted in the opinion that this ordinance was not enacted in the interest of public health. The permission to keep dairies within the limits, we said, negatived this view. It is true that a portion of an ordinance may be objectionable, and the other portions may be good, and in such cases that which is good remains. What was the offense denounced in the ordinance? Keep-

ing a dairy within certain prohibited limits without permission. Dairies were prohibited within certain limits without the permission of the city council. The city council could, under the ordinance, permit as many dairies as they desired within the prohibited limits. As stated, the offense is keeping a dairy without permission. Strike this out, and there would be no penalty. Therefore the permissive part of the ordinance was an essential and connected part of it, without which it would be only a prohibition. To declare the permissive part void, and to state that the penalty should remain, would be on our part legislation. It would be amending and re-enacting the ordinance. This is the business of the city council.

In re GARRABAD.

(54 N. W. 1104, 84 Wis. 585.)

Supreme Court of Wisconsin. April 11, 1893.

Application by Joseph Garrabad for a writ of habeas corpus, and to be discharged from the custody of the sheriff. A demurrer to the return of the sheriff was overruled, and petitioner by certiorari brings up the order for review. Order reversed, and petitioner discharged.

The other facts fully appear in the following statement by PINNEY, J.:

This is a proceeding by certiorari to review the decision of C. L. Dering, court commissioner of Columbia county, in the matter of his refusal to discharge the petitioner, Joseph Garrabad, from custody, and remanding him to the imprisonment of which he complains. It appears from the return of the sheriff of Columbia county to the writ of habeas corpus issued by the commissioner that on the 27th day of February, 1893, the petitioner was placed in his custody, and was held therein, under and by virtue of an execution or so-called "commitment," issued by V. Helman, a justice of the peace of the city of Portage, in said county, reciting that the city of Portage had recovered a judgment before said justice against the petitioner for the sum of \$5, together with \$13.85 costs of suit, for the violation of an ordinance of said city, to wit, No. 124, entitled "An ordinance to regulate street parades and insure public safety," and commanding the sheriff or any constable of the county to levy the same on the goods and chattels of the said petitioner, except such as the law exempts, and, in default thereof, to take his body, and him convey and deliver to the keeper of the common jail of Columbia county, to be there kept in custody for the term of 20 days, unless said judgment with costs was sooner paid, or he should be discharged by due course of law. The ordinance in question provides that "it shall be unlawful for any person or persons, society, association, or organization, under whatsoever name, to march or parade over or upon" certain streets (therein named) in the city of Portage, "shouting, singing, or beating drums or tambourines, or playing upon any other musical instrument or instruments, for the purpose of advertising or attracting the attention of the public, or to the disturbance of the public peace or quiet, without first having obtained a permission to so march or parade, signed by the mayor of said city. In case of illness or absence of the mayor or other officer hereby designated of the city, such permission may be granted and signed by the president of the council, city clerk, or marshal, in the order named: provided, that this section shall not apply to funerals, fire companies, nor regularly organized companies of the state militia: and provided, further, that permission to march or parade shall at no time be

refused to any political party having a regular state organization. Any person violating any of the provisions of this ordinance shall, upon conviction thereof, be fined in a sum not less than two dollars or more than ten dollars." The second section provided that the marshal should accompany such person or persons receiving permission while upon the portion of the streets described, to preserve order, warn the owners of horses upon said portions of said streets, and to carefully preserve the public safety; and when such permission is given by any officer other than the marshal, that he should forthwith notify the marshal of the granting of the same. The sheriff further returned that "the central part of the business portion of the city of Portage is contained within the limits defined in the ordinance, and the streets therein referred to were narrow, and cross and enter each other at various angles, and there was a great deal of traffic over the same, and that the petitioner had been duly and lawfully convicted of a willful violation of said ordinance upon trial duly and legally had." The petitioner demurred to the return, and the commissioner overruled the demurrer, and ordered that he be remanded to the custody of the sheriff, to be confined in the county jail of said county, according to the terms of said execution.

Rogers & Hall, for relator, Garrabad. W. S. Stroud, for court commissioner, C. L. Dering.

PINNEY, J., (after stating the facts.) The city charter of the city of Portage (Laws 1882, c. 132, § 31) confers upon the common council of the city power to pass ordinances and by-laws on certain subjects, under and by virtue of the delegation of the police powers of the state to the common council and city officers for the government of the city, and the preservation of order and public safety. In respect to such ordinances or by-laws it has long been the established doctrine that they must be reasonable, not inconsistent with the charter nor with any statute, nor with the general principles of the common law of the land, particularly those having relation to the liberty of the subject or the rights of private property. Dill. Mun. Corp. § 319, and cases cited in notes. The particular objections urged to the validity of the ordinance in question fall within the scope of the fourteenth amendment to the constitution of the United States, which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." These provisions apply equally to all persons within the territorial jurisdiction of the United States, without re-

gard to any differences of color or nationality; and the equal protection of the laws is a pledge, it is held, "of the protection of equal laws." *Yick Wo v. Hopkins*, 118 U. S. 369, 6 Sup. Ct. rep. 1064.

It is objected that the ordinance is void on its face, by reason of its operating unequally and creating an unjust and illegal discrimination, not only (1) by the express terms of the ordinance itself, but (2) it is so framed as to punish the petitioner for what is permitted to others as lawful, without any distinction of circumstances, where-by an unjust and illegal discrimination occurs in its execution, and which, though not made by the ordinance in express terms, is made possible by it; (3) in that it vests in the mayor, or other officers of the city named in it, power to arbitrarily deny persons and other societies or organizations the right secured by it to others to march and parade on the streets named. The general subject and scope of the ordinance is marching or parading by "any person or persons, society, association, or organization" over the streets named, "shouting, singing, or beating drums or tambourines, or playing upon any musical instrument or instruments, for the purpose of advertising or attracting the attention of the public, or to the disturbance of the public peace or quiet," without having obtained permission as prescribed in the ordinance. It provides, among other things, that the ordinance shall not apply to fire companies, nor to regularly organized companies of the state militia, and that permission to march or parade shall at no time be refused to any political party having a regular state organization. The permission, it will be seen, is required absolutely to be granted to political parties having a regular state organization, so they are practically excepted out of the ordinance. Whether permission shall be granted to any other society, civic, religious, or otherwise, depends, not upon the character of the organization, or upon the particular circumstances of the case, but upon the arbitrary discretion of the mayor or other officers named in the ordinance, acting in his absence. It is therefore argued that, as between different persons, societies, associations, or organizations, the ordinance operates unequally, and creates unjust and illegal discriminations by its express terms, and makes such discriminations not only possible, but necessary in its administration, and therefore that the ordinance is void upon common-law principles, as heretofore recognized and administered in the courts of the country. The rights of persons, societies, and organizations to parade and have processions on the streets with music, banners, songs, and shouting, is a well-established right, and, indeed, the ordinance upon its face recognizes to a certain extent the legality of such processions and parades, and provides for permitting them, in the discretion of the mayor, in all cases except those named, and

as to those the right is practically secured. The ordinance, as framed, and as it is to be executed under the arbitrary discretion of the mayor or other officer, is clearly an abridgment of the rights of the people; and in many cases it practically prevents those public demonstrations that are the most natural product of common aims and kindred purposes. "It discourages united effort to attract public attention and challenge public examination and criticism by associated purposes." *Anderson v. City of Wellington*, (Kan.) 19 Pac. Rep. 719, contains a careful discussion and examination of a similar ordinance, which was there held to be void as contravening common right. In *Re Frazee*, 63 Mich. 396, 30 N. W. Rep. 72, after full discussion by Campbell, C. J., a similar ordinance was also held void, and that it is not in the power of the legislature to deprive any of the people of the enjoyment of equal privileges under the law, or to give cities any tyrannical powers; that charters, laws, and regulations, to be valid, must be capable of construction, and must be construed, in conformity to constitutional principles, and in harmony with the general laws of the land; and that any by-law which violates any of the recognized principles of lawful and equal rights is necessarily void so far as it does so, and void entirely if it cannot be reasonably applied according to its terms; and no grant of absolute discretion to suppress lawful action can be sustained at all; that it is a fundamental condition of all liberty, and necessary to civil society, that men must exercise their rights in harmony with, and yield to such restrictions as are necessary to produce, peace and good order; and it is not competent to make any exceptions for or against the so-called "Salvation Army" because of its theories concerning practical work; that in law it has the same right, and is subject to the same restrictions, in its public demonstrations, as any secular body or society which uses similar means for drawing attention or creating interest. Hence the by-law there in question, because it suppressed what was in general perfectly lawful, and left the power of permitting or restraining processions and their courses to an unlawful official discretion, was held void; and that any regulation, to be valid, must be by permanent legal provisions, operating generally and impartially. The return of the sheriff utterly fails to show of what specific offense the petitioner was convicted; that is to say, in what particular respect he violated the ordinance. We may infer, however, for the purpose of argument and illustration, from the fact that the petition for the writ addressed to this court states that the petitioner is a member of the Salvation Army, that he was convicted of parading the streets in that capacity. It cannot be maintained that any person or persons or society have any right for religious purposes or as religious bodies to use the streets for pur-

poses of public parade because the purpose in view is purely religious, and not secular, but they certainly have the same right to equal protection of the laws as secular organizations. The objections urged against this ordinance are, we think, fatal to any conviction which might take place under it by reason of its unreasonable and unjust discriminations, and of the arbitrary power conferred upon the mayor or other officer of the city to make others in its administration and execution; so that it is impossible to sustain the conviction in any aspect in which the question may be viewed.

A careful examination of the decisions in various states, and the considerations upon which they are founded, is not material to the determination of the case, for the whole subject is governed and controlled by the provisions of the fourteenth amendment to the constitution of the United States, already referred to. In construing and applying this amendment, the supreme court of the United States have said in *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. Rep. 357, that it "undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness, and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition. * * * Class legislation discriminating against some and favoring others is prohibited, but legislation which, in carrying out a public purpose, is limited in its application if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment." The entire subject underwent careful examination in the case of *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. Rep. 1064, where the subject of city ordinances and the principles regulating their validity were considered. The objections to the validity of the ordinances in that case were, in substance, the same that are urged in this, and the ordinances in question were held void. The objections urged in the case of *City of Baltimore v. Radecke*, 49 Md. 217, were also, in substance, the same, for the ordinance in that case upon its face committed to the unrestrained will of a single public officer the power to determine the rights of parties under it, when there was nothing in the ordinance to guide or

control his action, and it was held void because "it lays down no rules by which its impartial execution can be secured, or partiality and oppression prevented," and that "when we remember that action or non-action may proceed from enmity or prejudice, from partisan zeal or animosity, from favoritism and other improper influences and motives easy of concealment and difficult to be detected and exposed, it becomes unnecessary to suggest or to comment upon the injustice capable of being wrought under cover of such a power, for that becomes apparent to every one who gives to the subject a moment's consideration. In fact, an ordinance which clothes a single individual with such power hardly falls within the domain of law, and we are constrained to pronounce it inoperative and void." The doctrine of this case was approved in *Yick Wo v. Hopkins*, supra, and the court in the latter case observed: "We are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration;" and proceeded to show that in the case there presented the ordinances in actual operation established "an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that, whatever may have been the intent of the ordinances as adopted, they were applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the fourteenth amendment to the constitution of the United States;" and the court added: "Though the law itself be fair on its face, and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as to practically make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution."

Nearly all the processions, parades, etc., that ordinarily occur are excepted from the ordinance in question, followed by a provision that permission to march or parade shall at no time "be refused to any political party having a regular state organization." It is difficult to see how this can be considered municipal legislation, dictated by a fair and equal mind, which takes care to protect and provide for the parades and processions with trumpets, drums, banners, and all the accompaniments of political turnouts and processions, and at the same

time provides, in effect, that the Salvation Army, or a Sunday school, or a temperance organization with music, banners, and devices, or a lodge of Odd Fellows or Masons, shall not in like manner parade or march in procession on the streets named without getting permission of the mayor, and that it shall rest within the arbitrary, uncontrolled discretion of this officer whether they shall have it at all. The ordinance resembles more nearly the means and instrumentalities frequently resorted to in practicing against and upon persons, societies, and organizations a petty tyranny, the result of prejudice, bigotry, and intolerance, than any fair and legitimate provision in the exercise of the police power of the state to protect the public peace and safety. It is entirely un-American, and in conflict with the principles of our institutions and all modern ideas of civil liberty. It is susceptible of being applied to offensive and improper uses, made subversive of the rights of private citizens, and it interferes with and abridges their privileges and immunities, and denies them the equal protection of the laws in the exercise and enjoyment of their undoubted rights. In the exercise of the police power, the common council may, in its discretion, regulate the exercise of such rights in a reasonable manner, but cannot suppress them, directly or indirectly, by attempting to commit the power of doing so to the mayor or any other officer. The discretion with which the council is vested is a legal discretion, to be exercised within the limits of the law, and not a discretion to transcend it or to confer upon any

city officer an arbitrary authority, making him in its exercise a petty tyrant. Such ordinances or regulations, to be valid, must have an equal and uniform application to all persons, societies, or organizations similarly circumstanced, and not be susceptible of unjust discriminations, which may be arbitrarily practiced to the hurt, prejudice, or annoyance of any. An ordinance which expressly secures to political parties having state organizations the absolute right to street parades and processions, with all their usual accompaniments, and denies it to the societies and other like organizations already mentioned, except by permission of the mayor, who may arbitrarily refuse it, is not valid, and offends against all well-established ideas of civil and religious liberty. The people do not hold rights as important and well settled as the right to assemble and have public parades and processions with music and banners and shouting and songs, in support of any laudable or lawful cause, subject to the power of any public officer to interdict or prevent them. Our government is "a government of laws, and not of men," and these principles, well established by the courts, by the fourteenth amendment to the constitution of the United States, have become a part of the supreme law of the land, so that no officer, body, or lawful authority can "deny to any person the equal protection of the laws." It is plain that the ordinance in question is illegal and void, and for this reason the order of the commissioner must be reversed. The order of the court commissioner is reversed, and the petitioner ordered discharged.

STATE v. SHERARD.

(23 S. E. 157, 117 N. C. 716.)

Supreme Court of North Carolina. Nov. 5, 1895.

Appeal from superior court, Wayne county; Starbuck, Judge.

John V. Sherard was convicted, under a city ordinance, of disorderly conduct, and appeals. Affirmed.

T. R. Purnell, for appellant. The Attorney General, for the State.

CLARK, J. The defendant was tried for breach of the following city ordinance:

"Sec. 2. That all disorderly conduct * * * within the city limits shall subject the offender to a fine of \$10 for each offence.

"Sec. 3. That if any person shall commit a breach of the peace or engage in any riotous or disorderly conduct within the limits of the city he shall pay a fine of \$50, provided that this section shall not be construed to relieve the mayor from the duty of binding over the offender, according to law, if the offence is one properly triable before a higher court."

The ordinances are valid under the ruling in several cases that the town may forbid, by ordinance, "disorderly conduct" which, from the evidence, did not amount to an indictable nuisance, or other offense forbidden by the general law of the state. *State v. Cainan*, 94 N. C. 880; *State v. Debnam*, 98 N. C. 712, 3 S. E. 742; *State v. Warren*, 113 N. C. 683, 18 S. E. 498; *State v. Horne*, 115 N. C. 739, 20 S. E. 443. Disorderly conduct, per se, is not forbidden by the general state law. There are acts amounting to disorderly conduct which come under the ban of the general law, and there are other acts, not amounting to criminal offenses against the state, which would also be disorderly conduct. To this latter class of cases do city ordinances against disorderly conduct apply. In *State v. Cainan*, supra, Merri-
 mon, J., says of a somewhat similar ordinance,

"The ordinance has reference to, and forbids, such acts and conduct of persons as are offensive and deleterious to society, particularly in dense populations, as in cities or towns, but which do not, per se, constitute criminal offenses, under the general law of the state." The same is repeated and elaborated in *State v. Debnam*. The court told the jury that if they were satisfied, beyond a reasonable doubt, that the defendant used the language testified to by the witness Burnett (the only witness for the state as to the language used) in a public restaurant, in a violent and abusive manner, and in a voice so loud that it could have been heard on the street, the defendant was guilty, and that it made no difference if he uttered a profane expression but a single time, provided it was uttered in the manner described. This brings the present case so exactly under the ruling in *State v. Debnam* and *State v. Cainan*, supra,—the facts in those cases being very similar to those in this,—that no further discussion is needed. His honor further charged that, if the facts were as testified to by the defendant, he was not guilty. Both the prosecuting witness and the defendant testified that the latter called the witness "a damned highway robber." His honor correctly held that this and the other language testified to by Burnett, if used in the loud and boisterous manner he stated, would make the defendant guilty. Such conduct is not amenable to the state law, for the language was not so repeated and so public as to become a nuisance to the public. *State v. Jones*, 31 N. C. 38. It was properly cognizable only under the town ordinance. Such conduct as that testified to by the prosecuting witness is not prohibited by the general state law, yet it would, if it could not be punished by city ordinance, become a serious annoyance to the public passing along the streets, hearing such loud, boisterous, and unseemly language, and threats of violence. No error.

HAWES et al. v. CITY OF CHICAGO.

(42 N. E. 373, 158 Ill. 653.)

Supreme Court of Illinois. Nov. 1, 1895.

Appeal from Cook county court; George W. Brown, Judge.

Petition by the city of Chicago for confirmation of a special assessment. John H. Dunham filed objections, which were overruled. He having thereafter died, his heirs and devisees, Helen E. Dunham Hawes and Mary V. Dunham, appeal. Reversed.

Kirk Hawes and I. J. Geer, for appellants. J. D. Adair, for appellee.

BAKER, J. This is an appeal from a judgment of confirmation of a special assessment made under an ordinance of the city of Chicago passed March 7, 1892, and providing for the construction of a cement sidewalk on Fiftieth street, from Lake avenue to Drexel boulevard. The commissioners appointed to assess the cost and expenses of the improvement upon the property benefited thereby returned into court an assessment roll in which the property here in question, then owned by John H. Dunham, since deceased, was assessed in the sum of \$1,915.50. Various objections in writing were filed by said Dunham and overruled by the court. The question of benefits was submitted to a jury, and the jury in their verdict reduced the assessment on the property to \$1,638.75. Motions for a new trial and in arrest of judgment, as well as motions to dismiss the petition and to cancel the assessment, were made by the objector, and overruled by the court, and exceptions taken; and the court entered judgment of confirmation for the amount fixed by the verdict of the jury, and the objector perfected an appeal to this court. John H. Dunham, the objector, thereafter died, and his death was suggested, and by leave of court Helen Elizabeth Dunham Hawes and Mary Virginia Dunham, who are his heirs at law and devisees under his will, now prosecute the appeal.

It is claimed by appellants that the ordinance providing for the construction of the cement sidewalk, and under which the assessment was made, is unreasonable, unjust, and oppressive, and therefore void. The uncontradicted evidence in the case shows that the tract of land, the south 50 feet of which is assessed for this improvement, is a 20-acre tract, having a frontage of 1,256 feet along Fiftieth street, where it is proposed to construct this cement sidewalk; that there is not a house or building of any kind upon it; and that it is an undivided tract of land, and the only use to which it is put is that of a field for raising hay. Only five months before the passage of this ordinance for the construction of a cement sidewalk the devis-

ance with a prior ordinance of the city, duly passed for that purpose, constructed and put down along the line of this street, in the very place where this cement sidewalk is to be placed, a wooden sidewalk, six feet in width, made of plank laid crosswise on stringers or joists, in strict conformity to the regulations and requirements of the city; and this plank sidewalk, at the time this ordinance on which the present proceedings are based was passed, and at the time this case was heard in the court below, was in good order and condition. The uncontradicted evidence further shows that the street along which it is proposed to construct this cement sidewalk has never been improved by the city. It is neither curbed nor paved, sewered nor watered, surveyed nor graded. If it is to be considered as a street 66 feet wide, then there is a line of telegraph poles planted right through the center of it; and the north 33 feet of it has never been formally dedicated by the owner to public use, nor condemned by any municipal corporation; and if the public have any right to it at all it is a right by prescription or by implied dedication. Such was and is the condition of this street in front of appellants' property. And yet, as appears from the record in the case, the common council of the city of Chicago, only five months after the construction at a great expense of a new plank sidewalk, built in conformity with the order of the city council, 1,256 feet long, passed a second ordinance ordering this new plank sidewalk torn up, and a cement walk, at an assessed expense of \$1,915.50 or \$1,638.75, put down in its place. It is admitted by the city—at least not denied—that this plank or wooden sidewalk, at the time the ordinance for the cement sidewalk was passed, and at the time this case was heard in the court below, was in good order and condition, and will answer equally well, for the purpose of travel, as a cement walk. Nor can it for a moment be contended that it is not unreasonable, unjust, and oppressive to compel the owner of a vacant 20-acre lot first to construct and pay for a wooden sidewalk, and then within less than six months, and when it is in substantially as good condition as when first built, and in all respects safe, convenient, and sufficient for public use and travel, take it up, throw it away, and put down another in its place, at an expense of over \$1,600. It seems to us that it cannot be, especially when we take into consideration the fact that the street has never been improved, curbed, graded, paved, or sewered. And further, it is clear from the evidence in the case that if this judgment should be affirmed, and appellant compelled to take up the wooden sidewalk and put down one of cement, the cement sidewalk will be ruined by putting in the house drains every 25 feet along the line of the street, or at least seriously injured; and whenever the street is improved, and

dwellings are constructed along the line of the walk, the walk itself is quite likely to be destroyed.

An ordinance must be reasonable; and if it is unreasonable, unjust, and oppressive, the courts will hold it invalid and void. *City of Chicago v. Rumpff*, 45 Ill. 90; *Tugman v. City of Chicago*, 78 Ill. 405. The question of the reasonableness or unreasonableness of a municipal ordinance is one for the decision of the court, and in determining that question the court will have regard to all the existing circumstances or contemporaneous conditions, the objects sought to be obtained, and the necessity or want of necessity for its adoption. *Toledo, W. & W. Ry. Co. v. City of Jacksonville*, 67 Ill. 37; *City of Lake View v. Tate*, 130 Ill. 247, 22 N. E. 791; 1 Dill. Mun. Corp. § 327. And even where the power to legislate on a given subject is conferred on a municipal corporation, yet, if the details of such legislation are not prescribed by the legislature, there the ordinance passed in pursuance of such power must be a reasonable exercise thereof, or it will be pronounced invalid. *Id.* § 328; *City of St. Paul v. Colter*, 12 Minn. 41 (Gil. 16); *Dunham v. Trustees*, 5 Cow. 462; *Breninger v. Treasurer of Town of Belvidere*, 44 N. J. Law, 350. In *Cooley on Taxation* (page 428) it is said: "A clear case of abuse of legislative authority in imposing the burden of a public improvement on persons or property not specially benefited would undoubtedly be treated as an excess of power, and void." In *Allen v. Drew*, 44 Vt. 174, the court, by *Redfield, J.*, says: "We have no doubt that a local assessment may so transcend the limits of equality and reason that its exaction would cease to be a tax or contribution to a common burden, and become extortion and confiscation. In that case it would be the duty of the court to protect the citizen from robbery under color of a better name." In *Wistar v. Philadelphia*, 80 Pa. St. 505, Chief Justice *Agnew* says: "But if we say the city may change its pavements at pleasure, and as often as it please, at the expense of the ground owner, we take a new step, and there must be explicit legislation to authorize such taxation. If, while the pavement is good, and stands in no need of repair, the city may tear it up, relay, and charge the owner again with one excessively costly, it would be ex-

action, not taxation. We are not at liberty to impute such a design to the legislature, unless it has plainly expressed its meaning to do this unjust thing." And in *Wistar v. Philadelphia*, 111 Pa. St. 604, 4 Atl. 511, it is held that where a property owner has well and properly set curbstones in front of his property at his own expense, on the proper line, in accordance with the style in common use, and they are in good order and repair, the expense of replacing them with others cannot be provided for by an assessment upon his property. In *Corrigan v. Gage*, 68 Mo. 541, it was held that the ordinance for the paving of the sidewalk there in question was unreasonable and oppressive, and subject to judicial inquiry, because such sidewalk was in an uninhabited portion of the city, and disconnected with any other street or sidewalk; and the judgment of the court below was reversed. In *City of Bloomington v. Chicago & A. R. Co.*, 134 Ill. 451, 26 N. E. 366, this court held that, where the ordinance is grossly unreasonable, unjust, and oppressive, that may be shown in defense of the application for confirmation. And in *City of Bloomington v. Latham*, 142 Ill. 462, 32 N. E. 506, we held that an ordinance directing that the cost of the land taken or damaged, or both, should be assessed upon and collected from the lands abutting upon the proposed alley or street in proportion to the frontage thereof, was unreasonable and void. And in *Davis v. City of Litchfield*, 145 Ill. 313, 33 N. E. 888, and *Palmer v. City of Danville*, 154 Ill. 156, 38 N. E. 1067, ordinances levying special taxes for local improvements were held to be unreasonable, arbitrary abuses of power, and void. The rule is that it requires a clear and strong case to justify a court in annulling the action of a municipal corporation acting within the apparent scope of its authority. But, in our opinion, such a case appears in this record. We think that the ordinance in question, in so far as and to the extent that it affects the property of appellants, is unreasonable, unjust, and oppressive, and therefore void. The judgment of confirmation as to the property of appellants is reversed, and the ordinance being void as to such property, the cause will not be remanded. Reversed.

CRAIG, J., dissents.

CITY OF SAGINAW *v.* McKNIGHT, Circuit Judge.

(63 N. W. 985.)

Supreme Court of Michigan. July 2, 1895.

Application for writ of mandamus by the city of Saginaw against Robert B. McKnight, circuit judge. Writ denied.

Wm. G. Gage, for relator. James H. Davitt, for respondent.

HOOKER, J. The charter of the city of Saginaw provides that "the common council may require transient dealers to take out license before engaging in business, and regulate the terms and conditions of issuing the same." Local Acts 1889, p. 900, § 9. Under the authority conferred by this section the council passed an ordinance which provides "that every person, not a resident, who shall bring into the city any goods, wares or merchandise, with a view to dispose of the same by auction or otherwise, without any bona fide intention of remaining permanently in the business of selling or disposing of such goods, wares or merchandise within the city, shall be deemed and treated as a transient trader or dealer, and before he shall sell or expose for sale any of such goods, wares or merchandise within the city, either by auction or otherwise, he shall pay to the city treasurer, for the use of said city the sum of ten dollars per day for every day or part of a day such goods, wares or merchandise shall be exposed for sale." The ordinance provides for the issue of a license upon such payment, and a penalty for noncompliance. It also provides that the words "goods, wares and merchandise" shall not be construed to include wood or fuel, or the products of the farm or dairy, when exposed or offered for sale by the producers thereof. One McDevitt was convicted before a justice of violating this ordinance. Upon appeal to the circuit court, the proceedings were quashed by the respondent, upon motion, upon the ground that the ordinance was invalid, and we are asked to issue a mandamus requiring him to vacate his order in the premises, and proceed with the trial of the cause.

It is asserted that the ordinance is void because: (1) It discriminates between residents of the city of Saginaw and other persons. (2) It discriminates between nonresidents, inasmuch as it requires a license only in cases where the goods sold are brought into the city. (3) The fee charged for the license is excessive and unreasonable. The

business of a transient dealer if subjected to the payment of a fee must be with a view to taxation, or to cover the expense of regulation under the police power. In this case it cannot be said that the fee can be sustained as a tax, because the charter does not indicate an intention upon the part of the legislature to authorize the municipality to tax the business, but only to license to the end that it may regulate it. The language of the charter indicates a design to promote the public good rather than to obtain revenue. As said by Mr. Justice Cooley, in *People v. Russell*, 49 Mich. 619, 14 N. W. 568: "That the regulation of hawkers and peddlers is important, if not absolutely essential, may be taken as established by the concurring practice of civilized states. They are a class of persons who travel from place to place among strangers, and the business may easily be made a pretense or a convenience to those whose real purpose is theft or fraud. The requirement of a license gives opportunity for inquiry into antecedents and character, and the payment of a fee affords some evidence that the business is not a mere pretense." This may be measurably true of transient dealers; and it is to protect the community from imposition and fraud, rather than to obtain revenue, that, in our opinion, this power was conferred. If this is so, there is no reason for an ordinance that applies only to nonresidents, as a class, and which exempts inhabitants of the city. We do not discuss the extent to which the city may go in restricting and limiting the number of said dealers, and whether tests relating to character, etc., may be applied (see *Kitson v. Ann Arbor*, 26 Mich. 327; *Sherlock v. Stuart*, 96 Mich. 193, 55 N. W. 845), as this ordinance does not attempt to regulate this business upon these lines. It permits any one to engage in the business of transient dealer. If by this term is meant a dealer who goes about from place to place, there is no apparent reason for thinking that such business only needs regulation when conducted by nonresidents. It seems to us that this ordinance is aimed at nonresidents, and there is room for the suspicion that it was designed for the benefit of residents, and therefore open to the criticism that it is in restraint of trade. Moreover, it borders very closely upon the line of unreasonable license fees. We think the case is within the doctrine of *Brooks v. Mangan*, 86 Mich. 576, 49 N. W. 633, if not of *Chaddock v. Day*, 75 Mich. 527, 42 N. W. 977, and that the ordinance is void. The writ will therefore be denied, with costs. The other justices concurred.

CLEMENTS v. TOWN OF CASPER.

(35 Pac. 472.)

Supreme Court of Wyoming. Jan. 16, 1894.

Error to district court, Natrona county; John W. Blake, Judge.

C. E. Clements was convicted of the violation of an ordinance of the town of Casper requiring certain salesmen, agents, and peddlers to procure a license to do business in such town, and he brings error. Reversed.

C. C. Wright, for plaintiff in error. Alex. T. Butler, for defendant in error.

GROESBECK, C. J. The plaintiff in error was arrested and tried before a police justice of the town of Casper for the violation of an ordinance of said town concerning peddlers. He was convicted, and appealed to the district court of the county, wherein he was tried by the court, and convicted. He brings error here, attacking the town ordinance as unconstitutional and void, as in contravention of the provisions of the constitution of the United States conferring power upon congress to regulate commerce among the several states, as in violation of a further provision of the federal constitution that the citizens of each state shall be entitled to all privileges and immunities of citizens of the several states, and as demanding an unreasonable license fee. The ordinance of the town was introduced in evidence in the court below, and the material portions of it read as follows: "An Ordinance Concerning Peddlers. Be it ordained by the town council of the town of Casper: Section 1. It shall not be lawful for any person or persons to hawk or peddle any goods, wares, merchandise or any other valuable article or things within the corporate limits of the town of Casper without first having obtained a license so to do as hereinafter provided. Sec. 2. No person, persons, company or corporation, being nonresident shall in person or by employee, travelling or local agent, drummer or salesman, sell by samples or otherwise in this town any goods, wares or merchandise, either foreign or domestic, without first obtaining a license as hereinafter provided. Sec. 3. Every person selling goods, wares or merchandise by samples or otherwise to be delivered in the future through a storekeeper or merchant of this town is a peddler. Sec. 4. This ordinance shall not apply to travelling agents and drummers who sell exclusively by sample or otherwise to regular merchants doing business in the town, nor to persons selling fruits, vegetables and farm products. Sec. 5. Every person wishing to obtain a license as a peddler shall apply to the town clerk or town marshal stating in what manner, in what articles and for what time he wishes thus to trade. And upon his paying license fee of \$25.00 in advance for each 24 hours

he shall be permitted to trade as a peddler. No license shall be issued for less than 24 hours." The other sections of the ordinance relate to the penalties prescribed for its violation, the issuance of the license, and the time when the ordinance shall take effect, and need not be considered. An attempt is clearly made by the ordinance to distinguish between commercial travelers selling exclusively by sample or otherwise to merchants doing business in the town, and to agents selling generally to the inhabitants of the town by sample, without regard to their vocation. The evidence offered discloses that the plaintiff in error was a traveling agent of Wilder Bros., located at Lawrence, Kan., and that he sold by samples shirts, muslins, woolens, silks, hosiery, and other articles, to be forwarded by his commercial house to the parties purchasing. The goods sold at Casper were forwarded by express to the purchasers, and were not delivered "in the future through a storekeeper or merchant" of the town. The case falls within the principles announced by the supreme court of the United States in the case of *Robbins v. Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. 592, and *Leloup v. Port of Mobile*, 127 U. S. 649, 8 Sup. Ct. 1380; but the facts of the case as presented by the evidence are more akin to those in the case of *Asher v. Texas*, 128 U. S. 129, 9 Sup. Ct. 1, where the plaintiff in error was a resident of the state of Louisiana, and was engaged in the business of soliciting trade by the use of samples for the house for which he worked as drummer, which was located in the city of New Orleans, in said state. His territory of operations was in the city of Houston, in Harris county, Tex., and his business was soliciting orders or trade for his employers, who were manufacturers of rubber stamps and stencils. While so engaged he was arrested, and fined for the alleged offense of pursuing the occupation of drummer without a license, contrary to a provision of the Penal Code of the state of Texas. Upon habeas corpus proceedings before the court of appeals of that state the conviction was sustained, and the petitioner remanded to the custody of the sheriff, and to review such judgment of the state court writ of error was brought in the federal supreme court. It was held by that tribunal that there was no distinction between the case and that of *Robbins v. Taxing Dist.*, supra, and the judgment of the court of appeals of Texas was reversed, and the case remanded, with instructions to discharge the prisoner.

The distinction made by the ordinance of the town of Casper, under consideration, between agents and drummers selling exclusively by sample or otherwise to regular merchants of the town and those selling to the public generally cannot alter the situation. The constitution of the United States having given to congress the power to regu-

late commerce, not only with foreign nations, but among the several states, that power is necessarily exclusive whenever the subjects of it are national in their character, or admit only of one uniform system or plan of regulation; and when congress has failed to make express regulations of the commerce among the states this indicates its will that the subject shall be left free from any restrictions or impositions, and any regulation of the subject by the state is repugnant to such freedom, except in matters of local concern only, where the state, by virtue of its police power, and its jurisdiction of persons and property within its limits, provides for the security of the lives, limbs, health, and comfort of persons and the protection of property; or when the state does those things which may otherwise incidentally affect commerce, such as the establishment and regulation of highways, canals, railroads, wharves, ferries, and other commercial facilities; or by the passage of inspection laws seeks to secure the due quality and measure of products and commodities; or by the passage of laws regulates or restricts the sale of articles deemed injurious to the health or morals of the community; or imposes taxes upon persons residing within the state or belonging to its population, and upon avocations and employments pursued therein, not directly connected with foreign or interstate commerce, or with some business or employment exercised under authority of federal, constitutional, or statutory law; or imposes taxes upon all property within the state, mingled with and forming the great mass of property therein. But the state, in making such necessary police and revenue regulations which are permissible, cannot impose taxes upon persons passing through the state, or coming into it merely for a temporary purpose, especially if connected with interstate or foreign commerce; nor can it impose such taxes upon property imported into the state from abroad, or from another state, and not yet become part of the common mass of property therein. No discrimination can be made by any such regulations adversely to the persons or property of other states; and no regulation can be made directly affecting interstate commerce, as such taxation or regulation would be an unauthorized interference with the power given to congress. One of the reasons for the adoption of the federal constitution, "in order to form a more perfect Union," was to prevent a number of systems of the regulation of commerce among the states, only limited to their number, and which was deemed a great evil under the articles of confederation. "In the matter of interstate commerce, the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems. The doctrine of the freedom of that commerce, except as regulated by congress, is so firmly established that it is unnecessary to enlarge further

upon the subject. * * * It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers,—those of Tennessee and those of other states,—that all are taxed alike. But that does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state." *Robbins v. Taxing Dist.*, supra; *City of Ft. Scott v. Pelton*, 39 Kan. 764, 18 Pac. 954. It makes no difference whether the articles imported into a state to be sold are farm products or manufactured articles or any kind of merchandise. The power of the state and its municipalities is exhausted as to her own resident dealers and agents, and to the property within its jurisdiction, unless the morals or health of the people are in danger from the foreign commerce introduced within her borders, or unless the property has been mingled and merged into the great mass of the property within the state. If the state cannot, through its statute, interfere with interstate commerce, surely it cannot delegate this power to one of her municipalities; and if a statute would be void imposing such restrictions as the ordinance of the municipality imposes, the ordinance is invalid as well, as the matter is wholly within the control of congress, and, where not regulated by that department of government, no inferior regulation can control, whether imposed by a state, or by any of its municipal subdivisions for governmental purposes. The words "peddler" and "hawker" have a settled meaning, independently of statutory definition. The former is an itinerant trader, a person who sells small wares, which he carries with him in traveling about from place to place, while the latter is also a trader who goes from place to place, or along the streets of a town, selling the goods which he carries with him, although it is generally understood from the word that a hawker also seeks for purchasers, either by outcry, as the derivation of the word would seem to indicate, or by attracting notice and attention to them as goods for sale by actual exposure or exhibition of them by placards or labels or by some conventional signal or noise. Of such occupations the state has control, and under the authority derived from the general incorporation act of the state, under which the town of Casper was incorporated, "to license, tax, regulate, suppress and prohibit hucksters, peddlers," etc., (Rev. St. § 468, subd. 9.) the town has a right to enact ordinances governing such occupations, and regulating, licensing, taxing, or prohibiting them. But the ordinance goes further than this, and attempts to do what has been unsuccessfully attempted time and again, for the benefit and advantage of domestic dealers, to exclude the agents of dealers from other states; and this cannot be done, as the property offered for sale is not under the jurisdiction of, or sub-

ject to, regulation by the state or its municipalities, and is not carried about from place to place, and exhibited for sale. The definition of a peddler in section 3 of the ordinance is not the generally accepted one, and under the evidence adduced in the case the plaintiff in error was not one, as the articles he sold were delivered in the future, through an express agent. It may be that this definition is not an exclusive one, but may be considered as an enlargement of the usual term; but the evidence plainly shows that the plaintiff was not a peddler in the usual understanding of the term, nor in the light of the definition of the ordinance, as he neither carried about his goods from place to place within the town, nor sold and delivered them simultaneously, nor made future delivery of them through a storekeeper or merchant of the town. Even where a commercial traveler or agent, usually denominated a "drummer," simply exhibits samples of goods kept for sale by his principal, and takes orders from purchasers for the goods, which are afterwards to be delivered by the principal to the purchasers, and payment for the goods is to be made to the principal by the purchasers on such delivery, such agent is neither a peddler nor merchant; nor even will a single sale or delivery of goods by such agent, or by any other person, out of the samples exhibited, or out of any other lot of

goods, constitute such person or other person a peddler or merchant. *City of Kansas v. Collins*, 34 Kan. 434, 8 Pac. 865, and cases cited; *Com. v. Farnum*, 114 Mass. 267. While the regulation of commercial travelers by license or otherwise may be deemed a great necessity by local dealers and others, particularly where orders are taken from the people generally, instead of from regular merchants and dealers, this authority can only be exercised by congress, and state laws and municipal ordinances are alike futile in any attempted control of the commerce between the states, except as herein indicated. The ordinance is void, as it is within the ban of the federal constitution as interpreted by the supreme court of the United States, both as an unlawful and unconstitutional interference with interstate commerce, and as an attempted discrimination adverse to nonresidents of the state. It appears to us that the license fee of \$25 for each 24 hours—which undoubtedly means a day—is excessive and unreasonable, but it is unnecessary to consider that question, as the ordinance is void for the reasons assigned. The judgment of the district court of Natrona county is reversed, and the cause remanded, with the direction to dismiss the complaint.

CONAWAY and CLARK, JJ., concur.

WAUKESHA HYGEIA MINERAL SPRING
CO. v. PRESIDENT, ETC., OF VIL-
LAGE OF WAUKESHA et al.

(53 N. W. 675, 83 Wis. 475.)

Supreme Court of Wisconsin. Nov. 15, 1892.

Appeal from circuit court, Waukesha county: A. Scott Sloan, Judge.

Action by the president and trustees of the village of Waukesha and others against the Waukesha Hygeia Mineral Spring Company to enjoin the laying of pipe line through the streets of the village, and action by the Hygeia Company against the president and trustees of Waukesha and others to restrain them from interfering with their work. Both actions were consolidated, and injunction restraining the laying of pipes granted, and injunction refused to prevent interference by village. The Hygeia Company appeals. Affirmed.

F. M. Hoyt (Keep & Lowden, of counsel), for appellant. Ryan & Merton and T. W. Haight, for respondents.

LYON, C. J. I. It is maintained by the learned counsel for plaintiff (the Hygeia Mineral Spring Company) that the village of Waukesha cannot maintain an action in the name of its president and trustees to enjoin that company from excavating trenches in the village streets, and laying its pipe therein, even though the company has no legal authority to do so. Without entering upon an extended discussion of this proposition, it is sufficient to say we are of the opinion that such right of action in the municipality is established by the judgment of this court in *Town of Jamestown v. Chicago, B. & N. Ry. Co.*, 69 Wis. 648, 34 N. W. 728. The reason is that such unlawful interference with the streets puts them out of repair, and almost necessarily increases, for the time being, the liability of injuries to persons and property of travelers thereon because of such defective condition. The village, being responsible for injuries caused by defects in its streets, and being charged by law with the duty of keeping them in repair, has such an interest in the streets that it may maintain actions to prevent any unlawful injury to them. The reasons why the case of *City of Milwaukee v. Milwaukee & B. R. Co.*, 7 Wis. 85, (on which counsel for plaintiff rely as denying a right of action by the village,) was not applicable to that case, and is not to this, are stated by Chief Justice Cole in his opinion in the *Jamestown Case*. We hold that the village of Waukesha may maintain such action.

II. For the purposes of this appeal it will be assumed that the village board of Waukesha had legal authority to grant to the Hygeia Company (the plaintiff) the right, on the conditions specified in the ordinance of July 14, 1891, to excavate trenches in the streets of the village, and to lay pipe therein for the purposes specified in the ordinance.

III. If the ordinance went into effect and remained in force,—that is, if there was no effectual reconsideration by the board of the vote by which it was passed,—it will be assumed that it still remains in force, and that, since its acceptance by the Hygeia Company, and the expenditure by the company of considerable sums of money on the faith of it, the same is irrevocable without the consent of the company.

IV. Was there an effectual reconsideration by the village board of the vote of July 14, 1891, by which the ordinance was passed? If the ordinance had not become absolutely binding upon the village before the motion to reconsider the vote of July 14th, by which it was passed, was adopted, there can be no doubt, we think, of the right of the village board to reconsider such vote, subject only to such restrictions as are imposed upon the board by the charter and by-laws of the village. Such right, in some form, is inherent in all deliberative assemblies or bodies. If a motion to reconsider, properly and timely made, prevails, the effect is to abrogate the vote reconsidered, and the matter stands before the assembly or body in the same condition as though the reconsidered vote had not been passed. *Cush. Parl. Law*, §§ 1264-1266, inclusive. The charter of the village of Waukesha is silent on the subject of reconsideration, but it authorizes the village board to establish by ordinance, resolution, or by-law rules to govern its proceedings. This gives the board power to prescribe the procedure on the reconsideration of votes. A copy of the village ordinances and by-laws, purporting to be published by authority of the board, was used on the argument. Its authenticity was not questioned. It contains a by-law on the subject of reconsideration. Although it is not found in the record before us, yet, inasmuch as it restricts, to some extent, the common-law or inherent right of reconsideration, it will be most favorable to plaintiff to regard it as properly before the court. We therefore construe the averment in the pleadings that the vote by which the ordinance was passed was duly reconsidered as an averment that it was reconsidered in the manner authorized by the by-law. It reads as follows: "It shall be in order for any member voting in the majority to move for a reconsideration of the vote on any question at the same or next succeeding meeting." We are of the opinion that the vote of July 14, 1891, was effectually reconsidered for either of two reasons: First, because the ordinance had not taken effect when the vote on its passage was reconsidered; and, second, if it had then taken effect, the vote on its adoption was reconsidered at the next succeeding meeting of the board, on motion duly made, and before the Hygeia Company had accepted the ordinance, or made any expenditure on the faith of it. Section 21 of the village charter (*Priv. & Loc. Laws*, 1859, c. 30) provides that "any ordinance, regulation, rule, or by-law enforcing any penalty or forfeiture

for the violation of its provisions, shall be published one week in some newspaper printed in said village before the same shall be in force."

We find no provision in the charter requiring the publication of ordinances which do not impose such penalties or forfeitures. The ordinance of July 14, 1891, seems to belong to the latter class, and not to the class specified in section 21. Probably it could have been framed so as to be operative without publication. But it was doubtless competent for the village board to provide that it should take effect at some future time, or on the happening of some future event. The board provided that it should take effect and be in force from and after its passage and publication. It is fair to assume that the board intended by the use of the latter term a publication for one week, as the term is used in section 21. The ordinance was first inserted in the official newspaper on July 19th, and the week expired July 26th; hence we think that the ordinance could not have taken effect until the latter date. It is the same as though it had been expressly provided therein that it should not be in force until July 26th. Before that date the motion to reconsider the vote by which the ordinance was passed was adopted. Of the right of the village board to reconsider that vote at any time before July 26th, provided it was

done in accordance with the by-law on that subject, we can entertain no doubt whatever; and in such case it would seem to be immaterial had the company accepted the prospective ordinance, or expended money on the faith of it before the reconsideration. Such acts could not defeat the right of the board to reconsider before the ordinance took effect. Again, let us suppose that the ordinance was in force when the vote to reconsider was passed. The ordinance was a voluntary grant of a privilege or easement to the Hygeia Company, for which the village received no consideration whatever. It was purely gratuitous, and, until accepted and acted upon by the grantee, was a mere license, which the grantor might revoke at its pleasure. The grantor did revoke it by reconsidering the vote adopting it before the ordinance was accepted or acted upon by the grantee, in strict compliance with the by-laws of the village board in that behalf. Hence, in any view of the case, we are impelled to the conclusion that when the Hygeia Company threatened and attempted to exercise rights under the ordinance to the injury of the streets of the village and of the owners of lands abutting on such streets, it acted without authority of law, and the court properly enjoined it from doing such acts.

Order affirmed.

CITY OF DETROIT v. FT. WAYNE & B. I.
RY. CO.

(54 N. W. 958, 95 Mich. 456.)

Supreme Court of Michigan. April 28, 1893.

Original petition for mandamus by the city of Detroit to compel the Ft. Wayne & Belle Isle Railway Company to comply with the conditions in an ordinance enacted by the city. Writ issued.

John J. Speed, for relator. Edwin F. Conely, for respondent.

McGRATH, J. Respondent, by virtue of an ordinance adopted in 1865, is operating a street railway in the city of Detroit, and this is an application for a mandamus to compel the said company to comply with the provisions of an ordinance enacted in January, 1893, requiring it to "issue and sell, by its conductors, or their duly-authorized agents, to persons applying therefor, upon each and every car operated by said company within the limits of the city of Detroit, tickets, to be good for transportation over the entire route of said company, or any portion thereof, traveling continuously either way, between" certain hours, at the rate of 8 tickets for 25 cents. The ordinance contains separate sections making each day's neglect to comply therewith an offense punishable by fine, and providing for the collection of such fine in an action at law. Respondent, as assignee of the Ft. Wayne & Elmwood Railway Company, is operating a street railway under an ordinance passed January 31, 1865, and the amendments thereto since enacted. The rate of fare was originally fixed at 5 cents, but by an amendatory ordinance passed in 1889 it was provided that between certain hours said company should issue and sell tickets at the rate of 8 tickets for 25 cents. Respondent accepted that ordinance, as it had those previously enacted. It, however, refuses to accept the ordinance enacted in January, 1893, or to comply with its terms. It answers that such tickets are kept for sale at certain places; that there are other street-railway companies operating railways within the limits of the city of Detroit, not regulated in respect of tickets by this or any other ordinance, and sets forth the following reasons why it should not be compelled to comply with the provisions of the ordinance: (1) The company is furnishing the tickets in reasonable quantities and in reasonable places. (2) The ordinance is illegal and void in this: (a) That the common council of the city of Detroit has no authority to pass any such ordinance; (b) that the relations of the city of Detroit with the respondent are of a contractual nature, and the same cannot be, in this regard, enforced by a penal ordinance; (c) that the ordinance seeks to regulate the internal and business

affairs of the respondent; (d) that the ordinance is penal, and invalid, because it undertakes to select one individual and punish him for a violation of it; (e) that the ordinance is unequal in its operation; (f) that the ordinance is not a proper exercise of the police power delegated to the municipality.

The Ft. Wayne & Elmwood Railway Company was organized in July, 1865, under chapter 94 of Howell's Statutes. Said act was subject to amendment, and in 1867 the following section¹ was added thereto: "All companies or corporations formed for such purpose shall have the exclusive right to use and operate any street railways constructed, owned, or held by them: provided, that no such company or corporation shall be authorized to construct a railway under this act through the streets of any town or city without the consent of the municipal authorities of such town or city, and under such regulations and upon such terms and conditions as said authorities may from time to time prescribe: provided, further, that after such consent shall have been given and accepted by the company or corporation to which the same is granted, such authorities shall make no regulations or conditions whereby the rights or franchises so granted shall be destroyed or unreasonably impaired, or such company or corporation be deprived of the right of constructing, maintaining, and operating such railway in the street in such consent or grant named, pursuant to the terms thereof." The ordinance of 1865, under which said company began operations, contained the following reservation, which is still in force: "It is hereby reserved to the common council of the city of Detroit, the right to make such further rules, orders, or regulations as may from time to time be deemed necessary to protect the interest, safety, welfare, or accommodation of the public in relation to said railway." In the absence of this reservation in the ordinance, it could not be said that the rights and franchises of the respondent are destroyed or unreasonably impaired by the requirement sought to be enforced; but, independently of this statutory provision, the reservation contained in the ordinance itself, viz. "to make such further rules and regulations as may from time to time be deemed necessary to protect the interest, welfare, or accommodation of the public," certainly includes the right to enact an ordinance providing that the company shall, for the accommodation of the public, keep tickets for sale upon its cars. Ordinances containing grants are construed liberally in favor of the public. It cannot be contended that the relation created by the ordinance is contractual, and at the same time that the reservation was of the right to enact police regulations only. The right to exer-

¹ Section 3527.

close police power exists independent of the reservation, and could not be bartered away. The contract is not unilateral, intended as a shield for respondent alone.

The right of a municipality, under the statute, to refuse its consent to the operation of a street railway in its streets is an absolute one, and its power, in the first instance, to impose conditions, is unlimited. The nature of the conditions imposed does not depend upon other grants of power. Respecting the imposition of further conditions after consent given, it is only necessary that the municipality keep within the scope of the reservation. In the recent case of *Sternberg v. State*, (Neb.) 54 N. W. Rep. 553, a similar ordinance was sustained under general provisions subjecting the company "to all reasonable regulations in the construction and use of said railway which may be imposed by ordinance," and empowering the municipality "to fix and determine the fare charged." The court held that the power to fix rates of fare necessarily carried with it all incidents necessary to carry the power into effect. "A street railway has no depots. Its stations are the street corners, and its business with the public is conducted on its cars;" and that it was not unreasonable to require the company to sell its tickets at its place of doing business. In *Railway Co. v. Berry*, (Ky.) 18 S. W. Rep. 1026, it was held that an ordinance requiring a street-car company to put a driver and conductor on each car was a proper exercise of the city's police power, and not an impairment of the company's rights, not being unreasonable or oppressive. See, also, *Railway Co. v. Philadelphia*, 58 Pa. St. 119. In the present case the power exercised was that reserved in the original grant.

The only question that remains is whether or not the penal provisions of the ordinance can be sustained. Even if invalid, the other provisions of the ordinance do not necessarily fall with them. It is well settled that an ordinance may be good in part, although bad in part. It is only necessary that the good and bad parts be so distinct and independent that the invalid parts may be eliminated, and that what remains contains all the essentials of a complete ordinance. *Dill. Mun. Corp.* § 421; *State v. Hardy*, 7 Neb. 377; *St. Louis v. St. Louis R. Co.*, 89 Mo. 44, 1 S. W. Rep. 305, and

14 Mo. App. 221. The general rule is that ordinances should be general in their nature, and impartial in their operation. Ordinances, however, containing grants, are of necessity several and independent of each other. The conditions imposed and requirements exacted are necessarily different, depending upon many and varied considerations. These ordinances are adapted to these varying conditions and circumstances. An ordinance prohibiting a particular railroad corporation by name from running locomotives by steam on a specific street does not contravene the principle stated. *Railroad Co. v. Richmond*, 96 U. S. 521. It does not follow that a like reservation is contained in every other railway ordinance. While it is true that ordinances of this class have been held to partake of the nature of contracts, yet they are none the less by-laws, and have the force and effect, in favor of the municipality, and against persons bound thereby, of laws passed by the legislature of the state. The power to enact an ordinance involves all the incidents necessary to give effect thereto. The charter of the city of Detroit (section 142) empowers the common council to punish the violation of any ordinance by imposing a fine. Irrespective of this express authority, a municipality has an implied power to provide for the enforcement of its ordinances by reasonable and proper fines. 1 *Dill. Mun. Corp.* § 338. The reservation in an ordinance to impose further conditions involves the right to provide for the enforcement of such conditions in the manner provided by law. The application of the rule contended for to this class of cases would prevent this method of enforcement of any condition imposed by virtue of a reservation of this character. The common council having the power to impose the condition in question by ordinance, it has, as incident thereto, the power to provide for its enforcement. The general rule above stated must be held to apply only to regulations, the authority to enact which depends solely upon the exercise of police powers, and not to conditions imposed by an ordinance, enacted by virtue of a reservation in a by-law, which partakes of the character of a contract. The ordinance is therefore valid, and the writ of mandamus must issue as prayed. The other justices concurred.

RATHBONE v. BOARD OF COM'RS OF
KIOWA COUNTY.

(73 Fed. 395.)

Circuit Court, D. Kansas, Second Division.
March 19, 1896.

No. 467.

This was an action by Charles D. Rathbone against the board of county commissioners of the county of Kiowa, Kan., upon coupons of county railway-aid bonds. Plaintiff has demurred to the answer filed by the defendant.

Gleed, Ware, & Gleed, for plaintiff. S. S. Ashbaugh and L. M. Day, for defendant.

WILLIAMS, District Judge. This suit is instituted upon past-due coupons, detached from 16 bonds, of \$1,000 each, issued by the defendant county to the Kingman, Pratt, & Western Railroad Company, and upon past-due coupons, detached from 30 bonds issued by the defendant to the Chicago, Kansas & Nebraska Railway Company. In each instance, the bonds were issued in payment of stock subscribed for by the defendant, in the respective companies.

Without stating the matters alleged in the answer in detail, it will be sufficient to say that the defendant county avers the bonds were issued by persons who were not clothed with power to issue the same, in disregard of the law governing the issue of this class of bonds, and that the amount issued is in excess of that which could be issued under the law. To the answer a general demurrer has been filed. All the steps taken by the county officers, in relation to the election, the canvass of the vote, and making of the subscriptions, if done at a time when the law authorized them to be done, appear to be regular.

The laws of Kansas authorize counties to subscribe for stock in railroad companies, and pay for the same with bonds of the character of those from which the coupons in suit are detached. The amount of indebtedness which may thus be created is fixed by statute:

"No county shall issue, under the provisions of this act, more than one hundred thousand dollars, and an additional five per cent. indebtedness, of the assessed value of such county, and in no case shall the total amount issued to any railroad company exceed four thousand dollars per mile, for each mile of railroad constructed in said county." Comp. Laws 1885, p. 783, § 68.

The courts of Kansas, in the construction of this act, have held that, after a proper petition has been filed, the board of commissioners of the county can be compelled to make an order for the holding of an election and submit the proposition of voting bonds to the voters of the county. They have also held that, after a subscription has been made, the officers designated by the statute to sign the bonds can be compelled to sign the same. In addition to this, they have held that, after

the subscription has been properly made and accepted, this creates a binding contract which can be enforced by law.

As will be seen, the amount of bonds which may be issued by any county, under the law, is \$100,000, and an additional 5 per cent. indebtedness of the assessed value of such county. The assessed value of the defendant county, on the 23d of March, 1886, was \$236,662. The greatest amount of bonds then which could be issued, under the act, was \$111,833.10. There were two propositions for bonds before the board of commissioners,—the one for \$115,000 to one company, and \$120,000 to another, the two amounts aggregating \$235,000; and the assessed value of the county was only \$236,662. Both propositions were submitted to the voters at the same election, and both were declared carried. Either of the sums so voted is greater than the limit prescribed by the act. But it was held, in *Chicago, K. & W. R. Co. v. Commissioners of Osage Co.*, 38 Kan. 597, 16 Pac. 828, that the voting for more bonds than could be lawfully issued did not invalidate the vote, and that bonds, under such a vote, might be issued to the lawful limit. Hence, the question of the amount voted passes out of the discussion.

On the 25th of June, 1886, the board of commissioners authorized the county clerk to make a subscription to the Chicago, Kansas & Nebraska Railway Company for 1,200 shares, of \$100 each. The order is as follows: "And the said board of commissioners of said county, as provided for in said proposition, and by law in such case, do now and hereby order and direct that the county clerk of said county of Kiowa, state of Kansas, do and shall, for and in behalf and in the name of said county of Kiowa, at once, subscribe, and make due and proper subscription of, twelve hundred shares, of one hundred dollars each, to the capital stock of the said Chicago, Kansas & Nebraska Railway Company," etc. In pursuance of this order, and on the same day, the county clerk executed the following instrument: "Whereas, on the 25th day of June, 1886, the board of county commissioners of the county of Kiowa, in the state of Kansas, did make and enter of record, upon the journals of its proceedings, an order directing the county clerk of said county of Kiowa, for and in the name and on behalf of said county of Kiowa, to make due and proper subscription to twelve hundred shares, of one hundred dollars each, of the capital stock of the Chicago, Kansas & Nebraska Railway Company," etc.: "Now, therefore, I, J. M. Crawford, county clerk of the county of Kiowa, state of Kansas, in pursuance of the statute in such case made and provided, and in obedience to the said order of the board of county commissioners, do hereby subscribe to, and make subscription of, twelve hundred shares, of one hundred dollars each, of the capital stock of said Chicago, Kansas & Nebraska Railway Company, for and on behalf of and in the name of the county of Kiowa,

state of Kansas, and I do hereby take twelve hundred shares of the capital stock of said railway company, in the name of said county, and for its behalf and benefit," etc. "In testimony whereof, I have executed, and signed and executed, this instrument and subscription, by subscribing my name hereunto, as county clerk of said county, and attesting the same under the seal of the said county of Kiowa, state of Kansas, at my office in Greensburg, the county seat of said county, this 25th day of June, 1886. [Signed] J. N. Crawford, County Clerk of the County of Kiowa, State of Kansas. Approved: J. W. Gibson, J. L. Hadley, Board of County Commissioners of Kiowa County, Kansas."

The action of the county clerk, in executing this instrument, on the day of its execution, was reported to the board of county commissioners, and it made the following order thereon: "The clerk of said county thereupon informs the board of county commissioners of said county of Kiowa that, in obedience to the foregoing order, he has made the subscription of stock, as required by said order, and now submits the same for approval, which is done by said board, and the said board further orders that the subscription, so made by the county clerk, be copied and spread upon the minutes and record of proceedings of said board, and that said subscription be delivered to said company, as provided in the foregoing order, and it is accordingly so done."

This action of the board of county commissioners, in connection with that of the county clerk, on the 25th day of June, 1886, under the adjudications of the courts of Kansas, constituted a concluded contract, if, at the time these acts were performed, the parties performing them had the power to act for and bind the county.

On the 2d of August, 1886, the board of commissioners of said county made the following order: "Board ordered clerk to subscribe for eleven hundred and fifty shares of the Kingman, Pratt & Western Railroad Company, at the value of one hundred dollars each, for the benefit of said county of Kiowa." On the same day the county clerk executed a similar instrument to that mentioned in the case of the subscription to the Chicago, Kansas & Nebraska Railway Company.

Waiving, for the time being, the question of whether the board of commissioners of Kiowa county had the power to order a vote on the proposition submitted, and whether they could make a binding subscription, upon which bonds might thereafter be issued, until after the expiration of one year, the question is, which of these subscriptions shall stand? The supreme court of Kansas has settled this precise question. In *Chicago, K. & W. R. Co. v. Commissioners of Osage Co.*, 38 Kan. 597, 16 Pac. S28, which was a proceeding by mandamus to compel the issue of bonds voted to that company, it appears there had been two votes, as in the case at bar, to different companies, and the amount

of the two, when added together, or taken singly, exceeded the amount of bonds which might lawfully be issued. The defense was a subscription had been made to the Kansas, Nebraska & Dakota Railroad Company, and that a delivery of bonds had been made to that company in payment of such subscription, and that this had exhausted the full amount which might be lawfully issued by the respondent in aid of railroads. The court, in speaking in response to that contention, say: "No county can, under any circumstances, issue more than \$100,000 and an additional 5 per cent. indebtedness of the assessed value of each county. This is the limit of their power to issue bonds, for railroad purposes, under the provisions of the act. * * * This issue may be to only one railroad company, or it may be divided between several; but, if the full amount is at first subscribed to some one railroad company, it [the county] has no power to subscribe to the capital stock of any other railroad company. * * * If it subscribes the full amount allowed to one company, its power is exhausted, and it cannot subscribe to others." This being true, it follows that all the bonds issued to the Kingman, Pratt & Western Railroad Company are void, because the limit of bonds which might lawfully issue had been reached and exhausted when the subscription was made, on the 25th of June, 1886, to the Chicago, Kansas & Nebraska Railway Company. The bonds issued to the Kingman, Pratt & Western Railroad Company recite that they are issued under an act entitled "An act to enable counties * * * to aid in the construction of railroads and to repeal section eight of chapter thirty-nine of the Laws of 1874," approved February 25, 1876, and by acts of said legislature amendatory thereof and supplemental thereto. This act informed every dealer in bonds purporting to be issued under the provisions of that act that no more than \$100,000 and the 5 per cent. therein mentioned could be issued thereunder. An examination of the records of the county would have shown the power to issue bonds had been exhausted.

At this late day it is hardly worth while to indulge in an extended citation of authorities in support of the proposition that every dealer in municipal bonds which, upon their face, refer to the statute under which they were issued, is bound to take notice of the statute and all its requirements, and of an equally well-settled rule that, if there is a want of power to issue the bonds, they are invalid in the hands of innocent purchasers, regardless of other recitals therein contained. In *Nesbit v. Independent Dist.*, 144 U. S. 617, 12 Sup. Ct. 746, a statute was under consideration which declared that "no county shall become indebted, in any manner, or for any purpose, to any amount, in the aggregate exceeding five per centum on the value of the taxable property within such county"; and the court say: "She was bound to take no-

tice of the value of taxable property within the district, as shown by the tax list." A like question arose in *Sutliff v. Commissioners*, 147 U. S. 234, 13 Sup. Ct. 318, under a similar provision; and the court held the purchaser of the bond was bound to take notice of the valuation of the taxable property of the county.

As against both classes of bonds from which the coupons in this suit are detached, the objection is made that Kiowa county could not vote for or issue bonds within one year after its organization. On the other hand, it is contended that there is nothing in the law which inhibited the defendant county from voting to issue bonds within one year after its organization, and that the inhibition in the statute in relation to new counties relates, solely, to the issuing of bonds. In that behalf it is urged that the proviso which contains the limitation against the issue of bonds by counties which have not been organized one year does not withhold the power to vote therefor. The most that can be said of a contention of this kind is that the power claimed on behalf of a new county to vote for bonds within a year after its organization is to be found in the silence of the statute. It is conceded that, in the matter of issuing bonds, counties which have been organized less than one year are not upon an equality with counties that have passed the year of probation. While this is conceded, it is denied that there is any inequality as to the power of voting to issue bonds. The rule of law in relation to the issue of negotiable bonds is that, whenever the power to issue is called in question, the authority to issue must be clearly shown, and will not be deduced from uncertain inferences, and can only be conferred by language which leaves no reasonable doubt of an intention to confer it. *Brenham v. Bank*, 144 U. S. 173, 12 Sup. Ct. 559; *Ashuelot Nat. Bank of Keene v. School Dist. No. 7, Valley Co.*, 5 C. C. A. 468, 56 Fed. 197. It seems to me that the power claimed for the issue of the bonds in question rests entirely upon uncertain inferences, rather than upon affirmative language, which leaves the mind free from doubt, as to the exercise of the power claimed. In the year 1876, the legislature of Kansas passed an act, of a general nature, providing for the organization of new counties. In that act there was a provision which declared "that no bonds, of any kind, shall be issued by any county, township or school district, within one year after the organization of such new county." On the 18th of February, 1886, it passed another act, covering the same subject as the act of 1876. This new act was a revision of the old, required a greater population, and threw some safeguards around the organization of new counties which were not in the act of 1876. In addition to this, it placed two provisos in the act of 1886, which are as follows: "Provided, that none of the provisions of this act shall prevent or prohibit the

county of Kiowa * * * from voting bonds, at any time, after the organization of said county. And provided, further, that no bonds of any kind shall be issued by any county, township or school district, within one year after the organization of such new county." While this act was in force, on the 22d of June, 1886, an election was held in Kiowa county, and a vote was taken on a proposition to subscribe \$115,000 to the Kingman, Pratt & Western Railroad Company and \$120,000 to the Chicago, Kansas & Nebraska Railway Company, and the vote was canvassed on the 25th of June, 1886, and the vote for both companies declared carried. On the 10th of February, 1886, the legislature passed an act, entitled "An act to restore or re-create the county of Kiowa," and on the 18th of February, 1886, another act was passed, making Kiowa county a part of the Thirty-Ninth senatorial district, and on the 19th another act, placing that county in the Twenty-Fourth judicial district. These acts have no material bearing on this case, and are referred to only to show, hereafter, that the legislature had knowledge and took cognizance of the fact that the people residing upon the territory out of which the county was created expected, at an early day, to have a county organization, and why the legislature attempted to permit Kiowa county to exercise a power which it did not grant to other new counties, which had not obtained a perfect county organization. Kiowa county, at the date of these acts, had not become an organized county, under the laws of the state. The census taker, appointed by the governor, on the 19th of March, 1886, filed his report, and on the 23d of March, 1886, the governor made proclamation, that there were 2,704 bona fide inhabitants in said county, that 549 of them were householders, and that the value of the taxable property in the county was \$236,662, and appointed three commissioners and a county clerk for said county. It is conceded that these officers qualified on the 27th of March, 1886, and, under the law, that from and after that date it was organized into what under the law of Kansas is called a "new county," and that it might do and perform whatever a new county might do.

Assuming, for the sake of argument, that the language of the proviso, found in the act of 1886, which declares that "none of the provisions of this act shall prevent or prohibit the county of Kiowa, or any township or school district therein, from voting bonds at any time after the organization of said county," confers power on that county to have voted bonds before it had been organized one year, the question arises, as to whether the legislature could, in the manner it so attempted, effect that object? Section 17 of article 2 of the constitution of the state declares: "All laws, of a general nature, shall have uniform operation throughout the state, and in all cases where a general law can be made

applicable, no special law shall be enacted." The supreme court of Kansas, in *Darling v. Rodgers*, 7 Kan. 598, declared that this provision of the constitution of the state was mandatory, and not directory. That the act in relation to the organization of new counties is a general law, in the sense that word is used in the constitution, does not admit of doubt.

In *Robinson v. Perry*, 17 Kan. 248, an act declared: "All persons owning or having sheep, shall keep the same from running at large, except in this act otherwise provided: provided, that the provisions of this act shall not apply to the county of Doniphan." This act was amendatory of an act, passed in 1869, which inhibited sheep from running at large in certain counties, unless the legal voters of those counties should, by vote, otherwise declare. The court held that the act of 1869, which exempted the counties named, as well as the act in question, interfered with the uniform operation of the fence act, was void, and was obnoxious to the provision of the constitution quoted. Judge Brewer, in discussing this provision of the constitution, uses this language: "The language is plain and positive that all acts of a general nature shall have uniform operation. No discretion is left to the legislature or the courts. * * * Now, the fence law of 1868 is, without question, a law of a general nature, and of uniform operation throughout the state. No part of its terms are repealed by the herd law. If the latter act be valid, the former no longer has a uniform operation throughout the state. That which was a general law, and had the required uniformity of operation, still remains the general law, but it is deprived of such uniformity. * * * Tested by this rule, the fence act of 1868 is valid, and the herd law of 1870 void. * * * But it is contended that the two clauses of this constitutional section must be construed together, and the positive requirements of the first clause considered as limited by the discretion given by the latter; * * * that power to pass special laws carries with it the power to limit the operation of the general law by special laws. * * * If the legislature can, by simply specifying the locality over which a law shall operate, change a law of a general nature, the obligations of this valuable constitutional provision are weaker than a rope of sand."

Now, what is the material difference between the acts referred to by Judge Brewer, and one that reads as follows: "No bonds of any kind, shall be issued by any county, within one year after the organization of such new county: provided, that the provisions of this act shall not apply to the county of Kiowa." The act of 1886 was evidently enacted as a general law, and intended to apply to the organization of all new counties throughout the state. To sustain such a proviso would limit its uniform operation, and give to one new county a power or privilege which the other new counties were

not permitted to have. It may be urged that the power conferred on Kiowa county may be sustained by treating the act as special. To do this would render the act obnoxious to that provision of the constitution which requires that no act shall contain more than one subject, which shall be expressed in the title.

It is contended by the defendant that the provisos in the act of 1886 are repugnant to each other, and that the last one must prevail. That contention is not assented to. But for the fact that it destroys the uniform operation of the great body of the act of 1886, the proviso might well stand. Kiowa county, as has been stated, was what is termed "duly organized" on the 27th of March, 1886. Having arrived at the conclusion that the proviso in relation to that county is void, we are confronted with the other proviso, which reads: "No bonds of any kind shall be issued, by any county, township or school district, within one year after the organization of such county." All law writers agree that, in the construction of a statute, the intention of the legislature should prevail, if it can be ascertained. All agree that the intent may be gathered from the act itself, and the supreme court of the United States have examined the course of a bill in the legislative body, and previous statutes on the same subject, for the purpose of arriving at that intent.

The defendant insists that the proviso which declares that "no bonds of any kind shall be issued by any county, township or school district, within one year after the organization of such county," does not authorize or warrant a new county to take any of the preliminary steps towards the issuing of bonds until after the expiration of one year after the organization, and that, to give the power to issue bonds, three prerequisites must consecutively follow each other: (1) the resident taxpayers of the county must present the character of petition, described in the law, to the board of commissioners; (2) they must order an election, and that a majority of the votes cast thereat must be in favor of the issue of the bonds; (3) that the board of commissioners make a valid subscription to or for the stock of the company in whose favor the vote was had. These prerequisites are common knowledge, especially by dealers in bonds, and by the members of a legislature; for the courts of every state in the Union, as well as the courts of the United States, have from time to time announced these propositions, in cases where the authority to issue was predicated upon the conditions stated. That this general knowledge exists is evidenced by the proviso which the legislature of Kansas incorporated in the act of 1886 in relation to Kiowa county. It had under consideration a general act in relation to the organization of new counties. It had knowledge of the fact, as its legislation shows, that Kiowa county, or rather its people, were seeking to have a county organization at an early day. It was revising and amending an act in relation to the organization of new counties, in

which there was a provision that no bonds should be issued by any new county within one year of its organization. It proposed to, and did, re-enact that proviso; but at the same time it desired to permit the then unorganized county of Kiowa to exercise a function which it was not willing should be exercised by any other new county to be formed thereafter. That act or thing, which it intended to permit Kiowa county to do, was what? The answer is that it intended to give to that county the privilege, not of issuing bonds within a year of its organization, but to vote for the issue of bonds within that year. If the proviso, as it stood in the act of 1876, and as carried into that of 1886, conferred upon new counties the right or privilege of voting for bonds within the first year of its organization, why was an attempt made, by a separate proviso, to authorize it to do what it is now claimed it might have done without the proviso? The proviso in relation to Kiowa county evinces an intent. The other proviso shows another. The first intent was to allow Kiowa county to vote before the expiration of the probationary year. The other shows an intent that the new counties to be thereafter organized should not have that power. The question of allowing new counties to vote for bonds within the year of minority was presented by the case of Kiowa county, and it is plain, from what was done, that there was no intention of extending a like privilege to other new counties. If it intended to have extended the privilege of voting at an earlier period than one year, it could have made that intent plain by saying that "nothing herein contained shall prevent any county from voting for bonds within a year of its organization." No such language is found, and no such power was intended to be granted.

The view here stated is borne out by subsequent legislation on the same proviso. In 1887 the greed to vote bonds made its appearance before the legislature. The result was that the proviso was amended so as to read: "No bonds, except for the erection and furnishing of school houses, shall be voted for and issued by any county or township, within one year after the organization of such county." Here the question of voting for bonds within the year was again up for consideration, and the right was extended, not to counties or townships, but to school districts. If the school districts had the right to vote for bonds, under the act of 1886, within one year after the organization of the county, why is it that, in 1887, those who desired that power for the school districts desired the law amended? If a school district had the power to vote before the expiration of a year, under the act of 1886, the counties and townships had. It must be borne in mind that the new counties, under the law of Kansas, were not clothed with all the powers of the older counties.

The circuit court of appeals for this circuit, in the case of Coffin v. Commissioners, 6 C. C. A. 288, 57 Fed. 137, had occasion to speak of the powers of the new counties coming into

being under the act of 1886, and say: "The proviso [in the act of 1887] does not, as counsel suppose, impose a limitation upon the exercise of power which becomes vested in a newly-organized county, as soon as commissioners are appointed, but its effect is to prevent such power from being vested until a year after its organization." If it be true that the power does not vest until a year after the organization, it follows, as right follows day, that there was no power in Kiowa county or its officers to order or hold an election; and, if this be true, the bonds are void.

The supreme court of Kansas, in speaking of the nature and powers possessed by counties during the first year of the organization, say: "Now, it will be admitted that, when the temporary county officers appointed by the governor have qualified and entered upon the discharge of their duties, the county is organized. But such organization is not a completed organization; or, at least, it is not an organization sufficient for all purposes. At that time the county has no county attorney, no clerk of the district court, no county treasurer, no superintendent, no county surveyor, and no probate judge." No presumption can be indulged in favor of such an organization unless it is given in plain and unmistakable language. Having held that the proviso in the act of 1886, which attempted to authorize or permit Kiowa county to vote for bonds before it had been organized one year, is obnoxious to the constitution of the state, where is the power to be found which authorized a vote and subscription at the time these acts were performed? It is urged that the general law authorized counties to make such vote and subscription, and under that the power existed, because the inhibition in the proviso in the act of 1886 only prohibits the issuing, and not the voting, of bonds within the year. To say that such power vested, to the extent of allowing a vote to be taken, within the year, is to accept the theory that the proviso is a limitation, which the circuit court of appeals declares is not true.

It is urged by the plaintiff that the county is estopped, by certain recitals in the bonds, from setting up a defense to these bonds. Recitals as to matters of fact sometimes operate as an estoppel, in the case of innocent purchasers for value; but recitals as to the existence of a law and the power conferred by it, which are false, cannot create an estoppel. The bond recites that it was issued under a certain act, and that the vote and subscription was had under and in pursuance thereof. The circuit court of appeals have decided that that act did not go into effect, as to newly-organized counties, until one year after their organization. In *Anthony v. Jasper Co.*, 101 U. S. 697, the court say: "Dealers in municipal bonds are charged with notice of the laws of the state granting power to make the bonds they find on the market."

In *Dixon Co. v. Field*, 111 U. S. 92, 4 Sup. Ct. 315, the question of estoppel by reason of

recitals in the bonds was under consideration, and the court say: "This does not extend to or cover matters of law. All parties are equally bound to know the law, and a certificate reciting the actual facts, and that thereby the bonds were conformable to law, when, judicially speaking they are not, will not make them so; nor can it work an estoppel upon the county to claim the protection of the law. Otherwise, it would always be in the power of a municipal corporation to which the power was denied to usurp the forbidden authority, by declaring that its assumption was within the law. This would be the clear exercise of legislative power, and would suppose such corporate bodies to be superior to the law itself."

In *National Bank of Commerce v. Town of Granada*, 4 C. C. A. 212, 54 Fed. 100, the circuit court of appeals for this circuit say: "It has never yet been held that a false recital in a bond can make that a law which never was law."

The same theory of estoppel now urged was insisted on in *Coffin v. Commissioners*, 6 C. C. A. 288, 57 Fed. 137, a case wherein the power of newly-organized counties, under the very act under consideration in this case, was passed upon, and the court say: "Even if we were able to concede, according to the contention of counsel, that a newly-organized county, in the state of Kansas, is endowed with the power, during the first year of its existence, and by virtue of the appointment and qualification of commissioners, to issue funding bonds, and the proviso is a mere limitation as to time of the mode of exercising the power, still we would not be able to concede the further proposition of counsel that purchasers of bonds issued by such counties are not required to ascertain the age of the county, but may rely upon the recitals which such bonds happen to contain." And, in the concluding portion of the opinion, this language is found: "It was at least incumbent on the purchaser of the bonds to ascertain that Kearney county had become a recognized political subdivision of the state. That fact had to be ascertained to enable the bondholder to further ascertain if it had power, under any circumstances, to issue bonds. A casual examination of the record kept in the governor's office would have disclosed the fact that the commissioners were not appointed until April 3, 1888, which was less

than four months previous to the day on which the bonds bear date."

Both series of bonds involved in this suit on their face recite that they were issued under and in pursuance of an act which, it has been seen, was not applicable to a new county, such as the defendant was, and in pursuance of a vote had on the 22d of June, 1886. If the holders of these bonds had examined the record in the executive office, they would have found the commissioners were appointed on the 23d of March, 1886, and that the vote for the issue of the bonds was had in three months thereafter. If they had examined the act regulating the creation of new counties, they would have found, as has the circuit court of appeals, that such counties did not become vested with the general powers conferred by the act recited in the bonds until one year after their organization, and that Kiowa county did not have power to contract for the issue of the bonds in suit.

The bonds issued to the Chicago, Kansas & Nebraska Railway Company contain, among other things, this provision: "This is one of a series of one hundred and twenty bonds, of like tenor, date, and amount [\$1,000 each], numbered from one to one hundred and twenty, inclusive, issued to the Chicago, Kansas & Nebraska Railway Company." An examination of the appraisal of the taxable property of Kiowa county would have shown that Kiowa county, at the time it contracted to issue the 120 bonds was without authority to issue more than \$111,000 of bonds. It appears, from the pleadings, however, that the whole number of bonds have not been issued. If the views expressed in this opinion are correct, it would serve no useful purpose to enter upon a discussion of the subject suggested. That a vote to issue bonds, not taken under the sanction of law authorizing the same, will not confer power to issue bonds, is well settled in *George v. Township*, 16 Kan. 72, and in *McClure v. Township*, 94 U. S. 429.

In conclusion, it may be stated that the power of the defendant county to vote, on the 22d of June, 1886, for the issue of these bonds, is not free from doubt. On the contrary, the power claimed can only be deduced from the silence of the statute and the absence of negative words. The power to issue the class of bonds in suit must rest on a more firm foundation. Entertaining these views, the demurrer is overruled.

DODGE v. CITY OF MEMPHIS.

(51 Fed. 165.)

Circuit Court, E. D. Missouri, N. D. May 24, 1892.

At law. Action by James B. Dodge against the city of Memphis, Mo., on certain municipal bonds. Heard on demurrer to the plea. Overruled.

Felix T. Hughes, for plaintiff.

The contract of subscription in the case at bar was valid, and expressly authorized, and the bonds were not wholly void, but valid, except as to their commercial quality, in which case the contract will be enforced in so far as it is valid, and the provision in the contract of subscription to pay in bonds will be held, in effect, a contract to pay in money at the time and under the conditions imposed in the order of subscription. *Gelpeke v. Dubuque*, 1 Wall. 222; author's views, subdivision 6, § 125, (4th Ed.) *Dill. Mun. Corp.*; *Mayor v. Ray*, 19 Wall. 468; *Hitchcock v. Galveston*, 96 U. S. 350; *Little Rock v. Merchants' Nat. Bank*, 98 U. S. 308; *Wall v. Monroe Co.*, 103 U. S. 78; *Clai-borne Co. v. Brooks*, 111 U. S. 400, 4 Sup. Ct. 489; *Wells v. Supervisors*, 102 U. S. 625; *Norton v. Dyersburg*, 127 U. S. 160, 8 Sup. Ct. 1111; *Hill v. City of Memphis*, 134 U. S. 198, 10 Sup. Ct. 562; *Gause v. City of Clarksville*, 5 Dill. 177, Fed. Cas. No. 5,276; *Babeock v. Goodrich*, 47 Cal. 488; *State Board v. Citizens' St. Ry.*, 47 Ind. 407; *Allegheny City v. McClurkan*, 14 Pa. St. 81; *Maher v. Chicago*, 38 Ill. 266; *Oneida Bank v. Ontario Bank*, 21 N. Y. 490; *Argenti v. City of San Francisco*, 16 Cal. 256; *Bank v. North*, 4 Johns. Ch. 370; *Ketcham v. City of Buffalo*, 14 N. Y. 356; *Evansville, etc., R. Co. v. City of Evansville*, 15 Ind. 395; *Mullarky v. Cedar Falls*, 19 Iowa, 21; *Sheffield School Tp. v. Andress*, 56 Ind. 162; opinion by Mr. Justice Story in *Bank v. Patterson*, 7 Cranch, 305; *Knapp v. Mayor*, 39 N. J. Law, 394.

The promise to give bonds in payment was, at furthest, only ultra vires, and, in such case, though specific performance of an engagement to do a thing transgressive of its corporate power may not be enforced, the corporation can be held liable on its contract. *Oneida Bank v. Ontario Bank*, 21 N. Y. 490; *Curtis v. Leavitt*, 15 N. Y. 95-99. The latter case especially decides that, where the right to make the contract exists,—but the bonds or security taken are unlawful,—the right to disaffirm the entire contract, and sue for "money had and received," or to only disaffirm the illegal security and sue upon the contract, rests with the holder of the security, and not with the corporation which gave it.

The contract can be enforced subject to the equities between the original parties, if there are any. *Hackettstown v. Swackhamer*, 37 N. J. Law, 191; *Dill. Mun. Corp.* (4th Ed.) §§ 120-123; *Daniel, Neg. Inst.* (2d Ed.) § 420; *Knapp v. Mayor*, 39 N. J. Law, 394.

The ground has been broadly taken that, for debts and obligations lawfully created, any corporation, public as well as private, has the implied authority, unless prohibited by statute, charter, or by-law, to evidence the same by the execution of a bill, note, or bond, or other contract; that the power to contract a debt carries with it the power to give a suitable acknowledgment of it; and there is no rule of law, in the absence of a statute limiting the length of the credit. *Municipality v. McDonough*, 2 Rob. (La.) 244 (1842); *Barry v. Merchants' Exch. Co.*, 1 Sandf. Ch. 280; *Curtis v. Leavitt*, 15 N. Y. 9; *Smith v. Law*, 21 N. Y. 299; *Bank v. Carpenter's Adm'rs*, 7 Ohio, 31; *Ketcham v. City of Buffalo*, 14 N. Y. 356; *Douglass v. Mayor, etc.*, 5 Nev. 147; *City of Richmond v. McGirr*, 78 Ind. 192; *Evansville, etc., R. Co. v. City of Evansville*, 15 Ind. 395; *Sheffield School Tp. v. Andress*, 56 Ind. 162; *Dill. Mun. Corp.* (4th Ed.) 443; 2 *Kent, Comm.* 224; *Beach, Ry. Law*, § 223; *Green's Brice, Ultra Vires*, p. 122; *Chicago, B. & Q. R. Co. v. City of Aurora*, 99 Ill. 211.

Henry A. Cunningham, for defendant.

THAYER, District Judge. The petition contains three counts. The first count alleges that in February, 1871, the town of Memphis, Scotland county, Mo., subscribed for \$30,000 of the capital stock of the Missouri, Iowa & Nebraska Railway Company, pursuant to power conferred by an act of the general assembly of Missouri, approved February 9, 1857, to incorporate the Alexandria & Bloomfield Railroad Company; that such subscription was authorized by a majority vote of the people of the town of Memphis, at an election held for that purpose; that as an evidence of such subscription coupon bonds to the amount of \$30,000 were issued and delivered by the town, which were to run for 20 years, and which matured on March 1, 1891. It is further averred that the town of Memphis received the stock in question, but subsequently sold it, and that for some years it paid the interest on its bonds; that it also appointed an agent to represent the town at meetings of the stockholders of the railway company. The petition then sets out one of the bonds in hæc verba, which appears to be a negotiable bond, in the ordinary form, such as are usually issued by municipal corporations; and avers that the plaintiff is the holder of 22 of such bonds, (giving their numbers,) and demands judgment for the amount due on the subscription as shown by the bonds, together with interest from March 1, 1891. The theory of the plaintiff's counsel seems to be that the first count of the petition is a suit on the bonds, treating them as nonnegotiable instruments; that the bond evidences the contract of subscription; and that the plaintiff is entitled to sue on the same, ignoring their negotiable quality precisely as if they were an ordinary nonnegotiable contract, which the town was authorized to make and had made. That the

town of Memphis had no authority to issue negotiable bonds in payment for the stock subscription is conceded. *Hill v. Memphis*, 134 U. S. 198, 10 Sup. Ct. 562. To the first count of the petition the defendant interposes several different pleas, including a plea of the statute of limitations, and to the latter plea plaintiff demurs.

It may be conceded that if the first count of the petition is properly founded on the bonds, calling them either bonds or the contract of subscription, then the statute of limitations is not well pleaded, because such bonds did not mature until March 1, 1891, and neither the 5, 10, nor 20 years' bar of the statute is applicable. But, on the other hand, if a suit cannot be maintained on the bonds according to plaintiff's contention, then the first count of his declaration is bad, and the demurrer to the plea is not tenable for that reason. I have looked through all of the federal cases cited by plaintiff's attorney in support of his contention that where negotiable bonds are issued by a municipal corporation without authority of law, and are void as negotiable instruments, a suit may nevertheless be maintained on such bonds, under some circumstances, as nonnegotiable instruments, and I have been unable to find a single paragraph in any of the decisions that fairly supports such a doctrine. The authorities show that, if negotiable paper is uttered by a municipal corporation without authority of law, it is void, and a suit cannot be maintained thereon for any purpose. *Mayor v. Ray*, 19 Wall. 468; *Hitchcock v. Galveston*, 96 U. S. 350; *Little Rock v. Merchants' Nat. Bank*, 98 U. S. 308; *Wall v. Monroe Co.*, 103

U. S. 78; *Hill v. City of Memphis*, 134 U. S. 198, 10 Sup. Ct. 562; *Merrill v. Monticello*, 138 U. S. 673, 11 Sup. Ct. 441.

They show, no doubt, that when a municipal corporation sells bonds which are void, and receives the money, it may be compelled to restore it in an action for money had and received. So when a municipal corporation is authorized to purchase property for any purpose, or to contract for the erection of public buildings or for any other public work, and it enters into such authorized contract, but pays for the property acquired or work done in negotiable securities which it has no express or implied power to issue, it may be compelled to pay for that which it has received in a suit brought for that purpose. In no case, however, does it appear that a suit has been sustained on a void bond, treating it as nonnegotiable, and as something entirely different from what the parties intended it should be. As the court understands the cases, suit must be brought on the implied promise which the law raises to pay the value of that which the municipality has received, but has in fact not paid for, because the securities issued in pretended payment were void. The demurrer to the plea must accordingly be overruled, because the first count is bad if it is regarded as stating a cause of action on the bonds. If it is treated as a suit to recover the value of certain stock which the town lawfully subscribed and acquired, and has not paid for, then the plea of the statute may be a good plea. At all events, it does not affirmatively appear that the plea in that event is untenable.

The demurrer is overruled.

CITY OF EVANSVILLE v. DENNETT.

(16 Sup. Ct. 613, 161 U. S. 434.)

Supreme Court of United States. March 2,
1896.

No. 509.

On a Certificate from the United States Circuit Court of Appeals, Seventh Circuit.

Action by William S. Dennett against the city of Evansville on certain bonds issued by the city. There was a judgment for plaintiff, and defendant brought error to the circuit court of appeals, which certified certain questions to the supreme court.

Geo. A. Cunningham, for plaintiff in error. George A. Sanders and A. W. Hatch, for defendant in error.

Mr. Justice HARLAN delivered the opinion of the court.

This case is here upon a certificate by the judges of the United States circuit court of appeals for the Seventh circuit.

It appears from the statement of facts accompanying the questions propounded to this court that on May 1, 1868, the city of Evansville issued its bonds, bearing date on that day, to the amount in the aggregate of \$300,000, in payment of its subscription to the stock of the Evansville, Henderson & Nashville Railroad Company.

Each bond was for the sum of \$1,000, was made payable to the bearer 30 years after date, with interest on presentation of the coupons attached, and was of the tenor and effect following:

"\$1,000.00 No. ———.

"United States of America.

"City of Evansville, State of Indiana.

"On account of stock subscription on the Evansville, Henderson and Nashville Railroad Company.

"The city of Evansville, in the state of Indiana, promises to pay to the bearer, thirty (30) years after date, the sum of one thousand dollars, at the office of the Farmers' Loan and Trust Company, of New York, with interest thereon at the rate of seven per centum per annum, payable semiannually at the office of the Farmers' Loan and Trust Company, in the city of New York, on the first day of November and the first day of May of each year, on presentation and delivery of the interest coupons hereto attached. This being one of a series of three hundred bonds of like tenor and date issued by the city of Evansville, in payment of a subscription to the Evansville, Henderson and Nashville Railroad Company, made in pursuance of an act of the legislature of the state of Indiana and ordinances of the city council of said city, passed in pursuance thereof. The city of Evansville hereby waives all benefit from valuation or appraisement laws.

"In testimony whereof, the said city of Evansville has hereunto caused to be set its corporate seal, and these presents to be sign-

ed by the mayor of said city, and countersigned by the clerk thereof.

"Dated the 1st of May, 1868.

"William H. Walker, Mayor.

"A. M. McGriff, City Clerk."

On December 1, 1870, the city also issued bonds, amounting in the aggregate to \$300,000, in payment of its subscription to the stock of the Evansville, Carmi & Paducah Railroad Company, each bond being dated December 1, 1870, for the sum of \$1,000, payable to the Evansville, Carmi & Paducah Railroad Company or bearer, December 1, 1895, with interest on presentation of the coupons attached. Each of those bonds was in the following form:

"Total amount authorized, three hundred thousand dollars.

"No. ———. \$1,000.00.

"City of Evansville, State of Indiana.

"Evansville, Carmi and Paducah Railroad Company.

"By virtue of an act of the general assembly of the state of Indiana, entitled 'An act granting to the citizens of the town of Evansville, in the county of Vanderburg, a city charter,' approved January 27th, 1847; and by virtue of an act of the general assembly of the state of Indiana, amendatory of said act, approved March 11th, 1867, conferring upon the city council of said city power to take stock in any company authorized for the purpose of making a road of any kind leading to said city; and by virtue of the resolution of said city council of said city, passed October 4, 1869, ordering an election of the qualified voters of said city upon the question of subscribing three hundred thousand dollars to the capital stock of the Evansville, Carmi and Paducah Railroad Company, and said election, held on the 13th day of November, 1868, resulting in a legal majority in favor of such subscription; and by virtue of a resolution of said city council passed May 23, 1870, ordering an issue of the bonds of the city of Evansville (of which this is a part) to an amount not to exceed three hundred thousand dollars, bearing interest at the rate of 7 per cent. per annum, for the purpose of paying the subscription as authorized above. The said city of Evansville hereby acknowledges to owe and promises to pay to the Evansville, Carmi and Paducah Railroad Company, or bearer, one thousand dollars, without relief from valuation or appraisement laws, payable on the 1st day of December, A. D. 1895, at the Farmers' Loan and Trust Company, in the city of New York, with interest from the date thereof, at the rate of 7 per cent. per annum, said interest payable semiannually on the first day of June and the first day of December, on presentation of the proper coupons for the same at said bank. The faith and credit and real estate revenues and all other resources of the said city of Evansville are hereby solemnly and irrevocably pledged for

the payment of the principal and interest of this bond.

"In testimony whereof, the mayor of the city of Evansville has hereunto set his hand, and affixed the corporate seal of the said city, and the city clerk of said city has countersigned these presents, this 1st day of December, 1870. Wm. Baker, Mayor.
"Wm. Helder, City Clerk."

The charter of Evansville, approved January 27, 1847, in the fortieth clause of section 30 thereof, gave the city power "to take stock in any chartered company for making roads to said city, or for watering said city, and in any company authorized or empowered by the commissioners of Vanderburg county to build a bridge on any road leading to said city; and to establish, maintain and regulate ferries across the Ohio river from the public wharves of said city: provided, that no stock shall be subscribed or taken by the common council in any such company, unless it be on the petition of two-thirds of the residents of said city, who are freeholders of the city, distinctly setting forth the company in which stock is to be taken, and the number and amount of shares to be subscribed: and provided, also, that in all cases where such stock is taken the common council shall have power to borrow money and levy and collect taxes on all real estate (either inclusive or exclusive of improvements, at their discretion) for the payment of said stock." Laws Ind. (Local) 1846-47, p. 14, c. 1.

This clause of the original charter of Evansville was, in form, amended by the act of the legislature of the state of Indiana, approved December 21, 1865, entitled "An act to amend the fortieth clause of section 30 of an act entitled 'An act granting to the citizens of the town of Evansville, in the county of Vanderburg, a city charter,' approved January 27th, 1847, and declaratory of the meaning of the second section of the same act." Laws Ind. (Called Sess.) 1865, pp. 76, 83.

The certificate before us states that, "under the decisions of the supreme court of Indiana, this act was repugnant to the constitution, and invalid, in that it did not set out the entire section as amended."

In 1867 the legislature of Indiana attempted to amend the act of 1865, above referred to, by an act approved March 11, 1867, entitled "An act to amend the first section of an act entitled 'An act to amend the fortieth clause of section thirty of an act entitled 'An act granting to the citizens of the town of Evansville, in the county of Vanderburg, a city charter,' approved January 27th, 1847, and declaratory of the meaning of the second section of the same,' approved December 21st, 1865, so as to authorize the common council of the city of Evansville to subscribe for and take stock in the Evansville, Henderson and Nashville Railroad Company, or any other company, or corporation, organized under

and by virtue of the laws of the commonwealth of Kentucky, for the purpose of constructing a railroad leading from Nashville, in the state of Tennessee, to a point on the Ohio river at or near Evansville, Indiana." Laws Ind. 1867, p. 121, c. 52.

This act authorized subscriptions for stock in the Evansville, Henderson & Nashville Railroad Company, or other railroad companies, by the city of Evansville, when a majority of the qualified voters of the city, who were also taxpayers, should vote therefor.

It is certified to us that, under the decision of the supreme court of the state of Indiana, this latter act was invalid, because amendatory of a prior invalid act.

The bonds in question, of both series, were in fact issued in attempted compliance with the act of March 11, 1867, referred to in the recitals in the bonds issued to the Evansville, Carmi & Paducah Railroad Company.

The ordinances of the city council of the city of Evansville authorizing the issue of both series of bonds disclose that they were issued pursuant to an election by the legal voters of the city of Evansville, but do not recite that any petition of resident freeholders of the city was presented to the common council, as required by the charter; and no such petition was, in fact, in either case, made or presented to the common council of the city of Evansville.

The defendant in error, William S. Dennett, purchased bonds of both issues, before maturity and for value, and is a bona fide holder thereof.

This suit is brought upon matured coupons of both series of bonds.

The questions propounded are these:

(1) Does the recital in the series of bonds issued in payment of subscription to the Evansville, Henderson & Nashville Railroad Company, that they were issued "in pursuance of an act of the legislature of the state of Indiana and ordinances of the city council of said city, passed in pursuance thereof," put a purchaser upon inquiry as to the terms of the ordinances under which the bonds were issued?

(2) Does the recital in the series of bonds issued to the Evansville, Carmi & Paducah Railroad Company, that they were issued "by virtue of a resolution of said city council passed May 23, 1870," put a purchaser upon inquiry as to the terms of that resolution, and charge him with knowledge of its terms?

(3) Do the recitals in the bonds issued to the Evansville, Carmi & Paducah Railroad Company, as against a bona fide purchaser for value of such bonds, estop the city of Evansville from asserting that such bonds were not issued, for stock subscribed, upon a petition of two-thirds of the resident freeholders of the city, distinctly setting forth the company in which stock was to be taken, and the number and amount of shares to be subscribed?

(4) Under the recitals in the bonds issued to the Evansville, Carmi & Paducah Railroad Company, was a bona fide purchaser for value put upon inquiry to ascertain whether a proper petition of two-thirds of the residents of Evansville, freeholders of that city, had been presented to the common council, before that body had subscribed for stock in the said railroad company?

(5) Was a bona fide purchaser for value of the bonds issued to the Evansville, Carmi & Paducah Railroad Company charged by the recitals in said bonds with notice that they were issued in pursuance of an invalid act, and in pursuance of an election under it, or had such a purchaser a right to assume, from the recital, that the prerequisites of both the valid act and the invalid act had been observed by the common council before the issuance of such bonds?

Such is the case made by the statement of facts. By that statement we are informed that the act of the legislature of Indiana of December 21, 1865, purporting to amend the fortieth clause of section 30 of the charter of Evansville granted in 1847, as well as the act of March 11, 1867, amendatory of the above act of December 21, 1865, was adjudged by the supreme court of Indiana to be unconstitutional and invalid; and, upon that basis, this court is asked to answer the questions embodied in the certificate from the judges of the circuit court of appeals.

Under this presentation of the case, we put aside the acts of 1865 and 1867, as giving no support to the rights of the plaintiff, and look alone to the charter of 1847.

It cannot be doubted that the power given by the charter of 1847, "to take stock in any chartered company for making roads to said city," authorized the city to subscribe to the capital stock of the Evansville, Henderson & Nashville Railroad Company, as well as of the Evansville, Carmi & Paducah Railroad Company. In *City of Aurora v. West*, 9 Ind. 74, 85, one of the questions was whether the authority given to the city council of Aurora, in the state of Indiana, "to take stock in any chartered company for making roads to said city," was authority to subscribe to the stock of a railroad company. The supreme court of Indiana said: "Here the power is expressly granted, and the question is merely whether the road in which the stock was subscribed is one contemplated by the charter. We think, also, that a company chartered to build a railroad is chartered to build a road. We think a railroad is a road as properly as a turnpike road or a plank road is a road; and one of these kinds was contemplated by the charter, and not common public highways, as the latter are not constructed by chartered companies, while the former are, and the stock is to be taken by the city in a chartered company. A railroad would accommodate the people of the city more than a plank or a turnpike road, and the stock would be of more value."

It is true that the city charter provided that "no stock shall be subscribed or taken by the common council in such company, unless it be on the petition of two-thirds of the residents of said city, who are freeholders of the city, distinctly setting forth the company in which stock is to be taken, and the number and amount of shares to be subscribed." But these were only conditions which the statute required to be performed or met before the power given was exercised. That there was legislative authority to subscribe to the stock of these companies cannot be questioned, although the statute declared that the power should not be exercised except under the circumstances stated in the statute.

Was a bona fide purchaser of bonds issued in payment of a subscription of stock—the power to subscribe being clearly given—bound to know that the conditions precedent to the exercise of the power were not performed? If the bonds had not contained any recitals importing a performance of such conditions before the power to subscribe was exercised, then it would have been open to the city to show, even as against a bona fide purchaser, that the bonds were issued in disregard of the statute, and therefore did not impose any legal obligation upon it. *Buchanan v. Litchfield*, 102 U. S. 278; *School Dist. v. Stone*, 106 U. S. 183, 187, 1 Sup. Ct. 84.

But the bonds issued on account of subscription to the stock of the Evansville, Henderson & Nashville Railroad Company recite that the subscription was "made in pursuance of an act of the legislature and ordinances of the city council passed in pursuance thereof." This imports not only compliance with the act of the legislature, but that the ordinances of the city council were in conformity with the statute. It is as if the city had declared, in terms, that all had been done that was required to be done in order that the power given might be exercised.

The bonds issued to the Evansville, Carmi & Paducah Railroad Company recite that they were issued "by virtue of" the city's charter of January 27, 1847, and that recital imports compliance with the provisions of the charter. The additional recitals that the bonds were issued by virtue of the act of March 11, 1867, as well as by virtue of a resolution of the city council, ordering an election of the qualified voters of the city, which resulted in a legal majority in favor of such subscription, and of a resolution ordering the issuing of bonds, did not, as between the city and a bona fide purchaser for value, prevent the latter from assuming the truth of the recital that the bonds were issued by virtue of—that is, in compliance with—the city's charter.

In *School Dist. v. Stone*, above cited, the court said: "Numerous cases have been determined in this court, in which we have said that where a statute confers power upon

a municipal corporation, upon the performance of certain precedent conditions, to execute bonds in aid of the construction of a railroad, or for other like purposes, and imposes upon certain officers (invested with authority to determine whether such conditions have been performed) the responsibility of issuing them when such conditions have been complied with, recitals by such officers that the bonds have been issued 'in pursuance of,' or 'in conformity with,' or 'by virtue of,' or 'by authority of,' the statute, have been held in favor of bona fide purchasers for value to import full compliance with the statute, and to preclude inquiry as to whether the precedent conditions had been performed before the bonds were issued." *Town of Coloma v. Eaves*, 92 U. S. 484; *Commissioners v. Bolles*, 94 U. S. 104; *Mercer Co. v. Hackett*, 1 Wall. 83; *Commissioners v. Beal*, 113 U. S. 227, 238, 239, 5 Sup. Ct. 433, and authorities there cited; *Cairo v. Zane*, 149 U. S. 122, 13 Sup. Ct. 803.

The charter of the city of Evansville gave authority to subscribe to the stock of these railroad corporations, and, as held by the supreme court of Indiana, in *Railroad Co. v. Evansville*, 15 Ind. 395, 412, the express power given to borrow money necessarily implied "the power to determine the time of payment, and also the power to issue bonds or other evidences of indebtedness."

As, therefore, the recitals in the bonds import compliance with the city's charter, purchasers for value, having no notice of the nonperformance of the conditions precedent, were not bound to go behind the statute conferring the power to subscribe, and to ascertain, by an examination of the ordinances and records of the city council, whether those conditions had, in fact, been performed. With such recitals before them, they had the right to assume that the circumstances existed which authorized the city to exercise the authority given by the legislature. The charter of 1847 contemplated a petition of two-thirds of the resident freeholders of the city. The act of 1867 provided for an election by the qualified voters, who were also taxpayers. Notwithstanding the provisions of the charter of 1847, the city council, before subscribing for the stock, might well have ascertained what were the wishes of taxpayers, who were also qualified voters. So far as the recitals in the bonds are concerned, the purchaser of bonds might properly have assumed that both methods were pursued. Although, in strict law, he was chargeable with knowledge that the act of 1867 was invalid, and, consequently, that an election held under it could not itself authorize a subscription of stock by the city, he was entitled to stand upon the validity of the city charter, and to act upon the assurance, given by the recitals in the bonds, that the provisions of that charter had been respected, and, therefore, that the subscription of stock had been preceded by a petition to the city

council of two-thirds of the resident freeholders of the city.

The present case comes directly within *Van Hostrup v. Madison City*, 1 Wall. 291, 297.

The city of Madison, Ind., was authorized by its charter "to take stock in any chartered company for making a road or roads to the said city, * * * provided, that no stock shall be subscribed * * * unless it be on petition of two-thirds of the citizens who are freeholders," etc. Mr. Justice Nelson, delivering the unanimous judgment of this court, said: "It is supposed that the authority to subscribe is tied down to a chartered road, the line of which comes within the limits of the city; and that the words are to be taken in the most liberal and restrictive sense. But this, we think, would be not only a very narrow and strained construction of the terms of the clause, but would defeat the manifest object and purpose of it. The power was sought and granted, with the obvious idea of enabling the city to promote its commercial and business interests, by affording a ready and convenient access to it from different parts of the interior of the state, and thus to compete with other cities on the Ohio river and in the interior which were or might be in the enjoyment of railroad facilities." Touching another issue in that case (and a similar issue is presented in the present litigation), the court said: "Another objection taken is that the proviso requiring a petition of two-thirds of the citizens, who were freeholders of the city, was not complied with. As we have seen, the bonds signed by the mayor and clerk of the city recite on the face of them that they were issued by virtue of an ordinance of the common council of the city, passed September 2, 1852. This concludes the city as to any irregularities that may have existed in carrying into execution the power granted to subscribe the stock and issue the bonds, as has been repeatedly held by this court. Our conclusion upon the whole case is that full power existed in the defendants to issue the bonds, and that the plaintiffs are entitled to recover the interest coupons in question. Even if the case had been doubtful, inasmuch as the city authorities have given this construction to the charter, and bonds have been issued and are in the hands of bona fide purchasers for value, we should have felt bound to acquiesce in it."

The case before us cannot be distinguished from the one just cited.

It may be added that the questions here presented were carefully examined by Judge Woods in the case of *Moulton v. City of Evansville*, 25 Fed. 382, 388, where will be found a full review of the adjudged cases. That was an action to recover the amount of coupons of bonds of the same class as those here involved. The conclusion there reached was that the purchaser of the bonds had a right to rely on the recital as showing that

a proper petition of freeholders was presented to the council before the subscription was ordered. The court said: "The purchaser, it is clear, was bound to know that the act of 1867, and the election ordered and held in compliance with it, were void, and that the law of 1847 required a petition of freeholders as a condition precedent to the right of the common council to make such stock subscriptions; but while bound, by legal construction, to know these things for himself, he, for the same reason, had a right to presume that the common council and officials of the city who ordered and made the bonds had the same knowledge; that they ordered and held the election as matter of precaution merely, and without the omission of any requirement of the act of 1847, as they must have intended to certify, if they acted honestly, as they are presumed to have acted intelligently, in ordering the bonds issued."

It is contended that the defense is sustained by *Barnett v. Denison*, 145 U. S. 135, 139, 12 Sup. Ct. 819. That case has no application to the issues here presented. The only point there decided was that the requirement of its charter that all bonds issued by the city of Denison "shall specify for what pur-

pose they were issued" was not satisfied by a bond that purported on its face to be issued by virtue of an ordinance, the date of which was given, but not its title or contents.

The conclusion we have reached upon legal grounds, and in accordance with our former decisions, is the more satisfactory because of the long time which elapsed before any question was raised by the city as to the validity of the bonds. The city having authority, under some circumstances, to put these bonds upon the market, and having issued them under corporate seal of the city, and under the attestation of its highest officer, certifying that they were issued in payment of a subscription of stock made in pursuance of the city's charter, the principles of justice demand that the bonds, in the hands of bona fide holders for value, should be met according to their terms, unless some clear, well-settled rule of law stands in the way. No such obstacle exists.

The court answers the first, second, and fourth questions in the negative, and the third in the affirmative. Its answer is in the negative to the first clause, and in the affirmative to the second clause, of the fifth question.

BOARD OF SUP'RS OF CUMBERLAND
COUNTY v. RANDOLPH.

(16 S. E. 722, 89 Va. 614.)

Supreme Court of Appeals of Virginia. Feb.
2, 1893.

Appeal from Cumberland county court.

Application by one Randolph for a mandamus to compel the board of supervisors of Cumberland county to levy a tax for the payment of certain coupons due on coupon bonds issued by defendant county. Judgment was entered for petitioner on an order granting the writ, and defendants bring error. *Admiral.*

Wm. M. Flanagan, E. P. Buford, and R. R. Fauntleroy, for plaintiffs in error. Pegram & Stringfellow and J. P. Fitzgerald, for defendant in error.

LEWIS, P. The first point made by the appellants is that upon the facts stated in the answer, which was not traversed, the writ ought to have been denied. But this is a mistaken view. At common law the return was not traversable, the party being left to his action for a false return. If, in such action, the return was falsified, a peremptory mandamus was granted. *Bac. Abr. tit. "Mandamus."* The defects of this procedure were, to a certain extent, remedied by the statute of Anne (chapter 20), which statute has not been reenacted in Virginia. Section 3014 of the Code, however, provides that the answer shall be "subject to any just exceptions;" and here, it is true, there are none. But, treating the answer as though it had been demurred to, the result by no means follows for which the appellants contend.

And, first, it is to be observed that the competency of the legislature to authorize counties or other municipalities to subscribe to the stock of a railroad company, and to issue bonds in payment of such subscriptions, is unquestionable; and this authority may be conferred with or without the sanction of a popular vote. The legislature possesses all legislative power not prohibited to it, and there is no constitutional restriction upon its powers in matters of this sort. The provision of the constitution of Virginia, that "the state shall not subscribe to, or become interested in, the stock of any company, association, or corporation," refers to subscriptions by the state, and not to a case like the present. *Redd v. Supervisors*, 31 *Grat.* 695; *Railroad Co. v. County of Otoe*, 16 *Wall.* 667. Legislative authority, moreover, as in the present case, to issue "coupon bonds," implies authority to issue bonds and coupons payable to bearer, which are negotiable instruments having all the qualities and incidents of commercial paper. *Arents v. Com.*, 18 *Grat.* 750; *Gelpeke v. Dubuque*, 1 *Wall.* 175; *Thompson v. Lee Co.*, 3 *Wall.* 327; *Livingston Co. v. Bank*, 128 *U. S.* 102, 9 *Sup. Ct.* 18; 1 *Dill. Mun. Corp.* (4th Ed.) § 513. It is also important to observe that the holder of such instruments is presumed to be a bona fide holder for value, before maturity, unless fraud

or illegality in the inception of the paper be shown. 1 *Daniel, Neg. Inst.* §§ 812, 815; *Smith v. Sac Co.*, 11 *Wall.* 139. And the question, therefore, is, do the matters set up in the answer constitute a good defense as against such a holder?

The main ground relied on is that the election held under the act of February 5, 1886, was not legally held, for want of notice. But the bonds from which the coupons in question were detached were not issued under that act, but under the act of February 8, 1888; and, independently of this consideration, the objection is without merit. The doctrine of the supreme court of the United States, and the one most consonant with reason and justice, is that where a municipal corporation has legislative authority to issue negotiable securities, dependent only upon the adoption of certain preliminary proceedings, such as a popular election, the bona fide holder has a right to assume that such preliminary proceedings have been regularly taken, if the fact be certified on the face of the instruments, or on the face of the bonds from which negotiable coupons are annexed, by the proper officers, whose duty it is to ascertain it. In such case the recital is itself a decision of the fact by the appointed tribunal, and estops the corporation, as against such holder, to contest it. The latter is not bound to ascertain the truth or falsity of such recital, or to look further than to see whether the requisite legislative authority has been conferred. Accordingly, such instruments have often been held valid, in the hands of a bona fide holder, under circumstances which would sustain a direct proceeding against the municipality to annul them, or to prevent their issue. *Commissioners v. Aspinwall*, 21 *How.* 539; *Supervisors v. Schenck*, 5 *Wall.* 772; *St. Joseph Tp. v. Rogers*, 16 *Wall.* 644; *County of Warren v. Marcy*, 97 *U. S.* 96; *Town of Coloma v. Eaves*, 92 *U. S.* 484; *Commissioners v. Bolles*, 94 *U. S.* 104; 1 *Dill. Mun. Corp.* (4th Ed.) § 549. Indeed, this court, in *De Voss v. City of Richmond*, 18 *Grat.* 338, went further, and applied the principle of estoppel in respect to a bond not negotiable. In that case the bond in question was issued by the city in lieu of a bond which had been previously confiscated by the late Confederate government, but there was nothing on its face to indicate that fact; it being in form an unconditional promise to pay. It was conceded, moreover, that in reissuing it in that form the city authorities disobeyed the mandate of an express ordinance in regard to reissuing bonds in lieu of confiscated bonds, and exceeded their authority. But as, in the opinion of the court, its unconditional form was equivalent to a representation by the city that it could be purchased with safety, it was held that, as against a bona fide holder for value, the city was estopped to deny its validity. "From the nature of the business," said the court, "the city knew that this representation, conveyed by the form of the bond, would be relied on, and must have intended that it should be. When a party has

relied upon it, and in good faith paid his money on the faith of it, it would be the height of injustice to allow the city to say that it is not true, and that it was his folly to believe it." Besides, whatever ground of objection there might be if the case stood upon the act of February 5, 1886, alone, any irregularities which may have occurred in the proceedings under that act were cured by the act of February 8, 1888. The latter act recognized the validity of the subscription that had been made, and all that had been done under the prior act, and in express terms authorized the issue of coupon bonds, on the completion of the railroad across the counties of Cumberland and Powhatan, in lieu of the conditional bonds which had already been issued to the railroad company under the prior act. This it was clearly competent for the legislature to do, both on principle and authority. As was remarked by Judge Burks in *Redd v. Supervisors*, 31 Grat. 695, "defective subscriptions may in all cases be ratified where the legislature could have originally conferred the power;" citing *Thompson v. Lee Co.*, 3 Wall. 327; *St. Joseph Tp. v. Rogers*, 16 Wall. 644, and other cases. In the present case the bonds from which the coupons in question were detached are payable to bearer, as are the coupons, and are regular and unconditional on their face. They, moreover, recite that they are issued in pursuance of the statutes above mentioned. This is an implied representation that the only condition precedent prescribed or contemplated by the act of February 8, 1888, namely, the completion of the road across the said counties, had been complied with; and the bona fide holder, as already stated, was not bound to look beyond this recital, except to the act authorizing the bonds to be issued.

Nor is there any merit in the objection founded on the pendency of the appeal from the or-

der of the board of supervisors rejecting the petitioner's claim on account of the coupons in question. It was not necessary to present the claim for allowance to the board; for, to all intents and purposes, it was audited when the bonds were issued. The coupons were binding obligations of the county, and the board had no power to disallow them. Its duty in the matter was clear, and purely ministerial, viz. to levy a tax to pay them, as section 1248 of the Code requires. Its order, therefore, rejecting the claim, from which the appeal was unnecessarily taken, does not in any degree partake of the nature of a judgment. A board of supervisors in Virginia has no judicial powers of any sort. This was decided in *Board v. Catlett's Ex'rs*, 86 Va. 158, 9 S. E. 999, and there are many like decisions by courts of other states. Nor is there any doubt that mandamus lies to compel a levy to be made, although the coupons have not been reduced to judgment; for, had a judgment been obtained, the only proper remedy to enforce it would be by mandamus. *County of Greene v. Daniel*, 102 U. S. 187; *Commissioners v. King*, 13 Fla. 451, 467.

Nor is the case affected by the allegation in the answer that the petitioner purchased the coupons at a discount. A similar objection was overruled in *Cromwell v. County of Sac*, 96 U. S. 51, in which case it was said that as the sales of such securities are usually made with reference to prices current in the market, and not with reference to their par value, it would lead to inconceivable confusion if bona fide purchasers in the market were restricted in their claims upon such securities to the sums they had paid for them.

This sufficiently disposes of the case, and renders it unnecessary to consider any other question discussed at the bar.

Judgment affirmed.

MERCER COUNTY v. PROVIDENT LIFE
& TRUST CO. OF PHILADELPHIA.

(19 C. C. A. 44, 72 Fed. 623.)

Circuit Court of Appeals, Sixth Circuit. March
3, 1896.

No. 326.

Error to the Circuit Court of the United States
for the District of Kentucky.J. B. Thompson and Alex. P. Humphrey, for
plaintiff in error. Thos. W. Bullitt and Samuel
Dickson, for defendant in error.Before TAFT and LURTON, Circuit Judges,
and SEVERENS, District Judge.

LURTON, Circuit Judge. The primary question which is to be decided is this: Were the bonds now held by the appellee corporation issued without authority of law, and in violation of the restrictions and conditions imposed by the act of May 15, 1886, heretofore set out, and under which they purport to have been issued? If they were issued in violation of the substantial provisions of the permissive act, they were void, unless they have fallen into the hands of an innocent purchaser for value, and the requisite circumstances exist to constitute an estoppel, precluding the county from showing that in fact they were issued in violation of law.

Passing for the present all the conditions precedent to the actual preparation and formal execution of the bonds under the third section of the enabling act, we shall consider the terms and conditions imposed by the fourth section, so far as the issuance of the bonds is affected by that section. Aside from the positive provision of the fourth section, it is evident, upon obvious principles of law, that these bonds, when prepared and formally executed according to the provisions of the third section, were invalid obligations, as lacking the essential element of delivery,—a step as necessary to the validity of a bond or other negotiable instrument as it is to the existence of a deed. 1 Daniel, Neg. Inst. § 63; Young v. Clarendon Tp., 132 U. S. 353, 10 Sup. Ct. 107. But whatever doubt might exist as to the obligatory character of these bonds while still in the hands of the county officials who had prepared and signed them, the fourth section, in clear terms, resolves. No power to make delivery of the bonds was conferred upon the county judge, or any other officer of the county, and all duty and power intrusted to them terminated with their formal execution; the act itself declaring that the bonds, thus apparently the formal contracts of the county, "shall not be binding or valid obligations until the railway of the said company shall have been so completed through such county that a train of cars shall have passed over the same, at which time they shall be delivered to said railroad company." The duty of the county judge with reference to these incomplete instruments pending compliance with the

condition upon which they might become vital obligations, by delivery, was to "order that such bonds shall be deposited with a trustee or trust company, to be held in escrow, and delivered to the said railroad company when it shall become entitled to the same by the construction of its road through such county." This last statutory duty was performed, and the bonds were "deposited" with a trustee, to be held in escrow and delivered when the condition authorizing delivery had been performed. That condition was that the railroad of the Louisville Southern Railroad Company should be completed "through" the county of Mercer, so that a train of cars should have passed over the same. The defense of the county is that the railroad was never constructed through the county, and that the trustee violated his duty, and delivered them before that condition had been complied with. The finding of fact touching immediately upon compliance with this condition was "that the Louisville Southern Railroad did not run from one line of the county of Mercer through to the opposite or to another line of the county, but that its railroad entered Mercer county on the line of said county next to Anderson county, and ran through said county fifteen miles to Harrodsburg, and from there to Burgin, where a junction was made with the Cincinnati Southern Railroad, making in all 19.72 miles of railroad in said county of Mercer; but this line of railroad did not reach the other or another line or boundary of the county by about two miles from the nearest point." This finding seems to conclusively settle the question that the railroad company did not construct its railroad through the county. The requirement was that the road should be completed "through" the county,—not through the county to Harrodsburg, or to Burgin, or to a junction with the Cincinnati Southern Railroad, but through the county entirely; that is, from one side or line to the opposite or another side or line. If the legislature had used the very common preposition, "through" in any limited or unusual sense, it would appear in the context. That it was used with its ordinary meaning of "from one side to the opposite side" or another side, or "from one surface or limit to the other surface or limit," seems to us very plain, from the whole tenor of the statute. That it was not used in the sense of "to" and "into" is plain, from the proviso of the same act, which brings the prepositions "to" and "through" into apposition, in the provision that "the subscription shall not be binding" "unless such railroad shall pass to or through the corporate limits of the town of Harrodsburg." The argument that this was a substantial compliance with the condition does not meet with our assent. The object of the act was to secure to Mercer county a railroad entirely through the county. To build to within two miles of the statutory requirement is not a substantial fulfillment of the provision. Whether this was an important or unimportant matter, it is not

for us to say. The legislature had the undoubted authority to impose this condition, or any other it saw fit. Whether wisely or unwisely, the power to issue any bonds was made dependent on the performance of this condition. The provisions that they should not be valid until the performance of this condition, and that the stakeholder should not deliver them until this railroad should be constructed through the county, are imperative, and limit the power of the county and of this trustee to the issuance of bonds only when the requisite facts actually existed. These restrictions were intended to secure the actual completion of the railroad, and guard against the possible misapplication of the bonds to purposes not designed. Restrictions in acts of this kind, intended to guard the public from the negligence or crimes of their officials, and to secure exact compliance with the terms upon which the power of taxation may be exercised in aid of railroad construction, are entitled to favorable consideration. The utterances of the supreme court upon the effect of restrictions and limitations in such legislation have been uniform, and announce a wise public policy. In *Barnum v. Okolona*, 148 U. S. 393, 13 Sup. Ct. 638, Mr. Justice Sbrins, for the court, said: "That municipal corporations have no power to issue bonds in aid of railroads, except by legislative permission; that the legislature, in granting permission to a municipality to issue its bonds in aid of a railroad, may impose such conditions as it may choose; and that such legislative permission does not carry with it authority to execute negotiable bonds, except subject to the restrictions and conditions of the enabling act.—are propositions so well settled by frequent decisions of this court that we need not pause to consider them. *Sheboygan Co. v. Parker*, 3 Wall. 93-96; *Wells v. Supervisors*, 102 U. S. 625; *Claiborne Co. v. Brooks*, 111 U. S. 400, 4 Sup. Ct. 489; *Young v. Clarendon Tp.*, 132 U. S. 340-346, 10 Sup. Ct. 107."

In *Barnett v. Denison*, 145 U. S. 139, 12 Sup. Ct. 819, Mr. Justice Brown, in delivering the opinion of the court, said: "The provisions of the statute authorizing them must be strictly pursued, and that the purchaser or holder of such bonds is chargeable with notice of the requirements of the law under which they are issued."

The conclusion we reach is that this condition has not been complied with, and that the trustee, in delivering these bonds, did so in violation of his duty, and acted without authority of law.

This brings us to the consideration of the question as to whether the county is estopped to make this defense. The learned trial judge found as a fact that the appellee bought in open market, for value, and with no actual knowledge that the conditions imposed by the enabling act had been in any way unperformed. That such a municipal corporation had no general authority to issue such negotiable securities, and that the purchaser is

chargeable with notice of the terms, conditions, and requirements of the permissive statutes under which they purport to be issued, is well settled. *Marsh v. Fulton Co.*, 10 Wall. 676; *McClure v. Township of Oxford*, 94 U. S. 429; *Northern Bank v. Porter Tp.*, 110 U. S. 609, 4 Sup. Ct. 254; *Barnett v. Denison*, 145 U. S. 139, 12 Sup. Ct. 819; *Barnum v. Okolona*, 148 U. S. 395, 13 Sup. Ct. 638; *Citizens' Sav. & Loan Ass'n v. Perry Co.*, 156 U. S. 701, 15 Sup. Ct. 547.

First, it is said that the recital in these bonds imports a compliance with all the restrictions and conditions of the enabling act, and that these recitals cannot be contradicted. The recital in the bond is that it was "issued pursuant to the authority conferred upon the said county by an act of the legislature of Kentucky entitled, 'An act to authorize the county of Mercer to subscribe aid to the Louisville Southern Railroad Company,' approved May 15, 1886." Looking to the act referred to, as the purchaser was bound to do, he discovered that these bonds were to be executed and deposited in escrow, and delivered only upon the completion of the Louisville Southern Railroad through the county of Mercer. By this provision he was advised that the recital that the bond "was issued pursuant to the authority" of the act referred to was a recital which, in the nature of things, could only refer to facts antecedent to the deposit of the bonds in escrow, and could not possibly operate as a recital covering the subsequent completion of the railroad through the county. The enabling act operated as notice to him that the bonds were not "binding and valid obligations" when placed in escrow, and would not become valid and legal securities "until the railway of the said company shall have been so completed through such county that a train of cars shall have passed over the same." The purchaser therefore bought with notice that the depository held the bonds "in escrow," and had no power to deliver them until the company should "become entitled to the same by the construction of its road through the county." The recitals in the bonds must therefore be referred to the acts which, under the permissive law, were to precede the execution and deposit of the bonds in escrow, and do not operate as a recital of facts which could not have existed when they were made. Where recitals are relied upon to cut off the defense that municipal bonds are in fact issued without authority of law, or in violation of law, they should be fairly and reasonably construed, and be such as to clearly indicate that the conditions and requisites of the law had been complied with. *Risley v. Village of Howell*, 12 C. C. A. 218, 64 Fed. 453; *Northern Bank v. Porter Tp.*, 110 U. S. 618, 619, 4 Sup. Ct. 254; *School Dist. v. Stone*, 106 U. S. 183-187, 1 Sup. Ct. 81. In the case last cited, Mr. Justice Harlan, for the court, concerning the construction of words in a bond claimed to operate as a recital estopping a municipality

from showing that the bonds had been issued in violation of law, said: "Numerous cases have been determined in this court in which we have said that where a statute confers power upon a municipal corporation, upon the performance of certain precedent conditions, to execute bonds in aid of the construction of a railroad, or for other like purposes, and imposes upon certain officers—invested with authority to determine whether such conditions have been performed—the responsibility of issuing them when such conditions have been complied with, recitals by such officers that the bonds have been issued 'in pursuance of,' or 'in conformity with,' or 'by virtue of,' or 'by authority of,' the statute, have been held, in favor of bona fide purchasers for value, to import full compliance with the statute, and to preclude inquiry as to whether the precedent conditions had been performed before the bonds were issued. But in all such cases, as a careful examination will show, the recitals fairly import a compliance, in all substantial respects, with the statute giving authority to issue the bonds. We are unwilling to enlarge or extend the rule now established by numerous decisions. Sound policy forbids it. Where the holder relies for protection upon mere recitals, they should at least be clear and unambiguous, in order to estop a municipal corporation, in whose name such bonds have been made, from showing that they were issued in violation or without the authority of law."

There is therefore no estoppel by recital because there is no statement in the bonds implying that the Louisville Southern Railroad had been completed through the county, as required by the provisions of the enabling act. *Buchanan v. Litchfield*, 102 U. S. 278; *Carroll Co. v. Smith*, 111 U. S. 561, 562, 4 Sup. Ct. 539; *Lake County v. Graham*, 150 U. S. 674, 9 Sup. Ct. 654; *Citizens' Sav. & Loan Ass'n v. Perry Co.*, 156 U. S. 692-701, 15 Sup. Ct. 547. We have then to deal with bonds which contain no recital whatever implying that the most important of the conditions precedent specified in the enabling act, upon which the power to issue them depended, had been performed. In this respect the case is distinguished from cases where the recitals were such as to imply compliance with all precedent conditions, such as that they had been "issued pursuant" to a particular act, as in *Knox Co. v. Aspinwall*, 21 How. 540, or "by virtue of the law of the state entitled 'An act,'" etc., as in *Insurance Co. v. Bruce*, 105 U. S. 328, or "under and in pursuance of an act," etc., as in *Lewis v. Commissioners*, 105 U. S. 739, or "under authority of an act," etc., as in *Oregon v. Jennings*, 119 U. S. 74, 7 Sup. Ct. 124. This court, in *Cadillac v. Institution*, 7 C. C. A. 574, and 58 Fed. 935, 16 U. S. App. 545, held that, under an act authorizing the issuance of new bonds "to extend the time of payment of old bonds falling due," a recital that a bond was issued "for the purpose of extending the time

of payment of bonds falling due" estopped the city from showing that the bonds thus refunded were void bonds. So in *Risley v. Village of Howell*, 12 C. C. A. 218, 64 Fed. 453, the bonds recited that they were issued under an act approved February 25, 1885, which act authorized the issuance of bonds "to raise money to make public improvements." It was held that it was not a defense to show that in fact the money obtained for the bonds had been expended under an ordinance, referred to in the bonds, for a purpose not a "public improvement," within the decisions of the supreme court of the state. On the contrary, the case falls distinctly within another class of cases, where the bonds either contained no recitals, or the recitals were made by one not entrusted with the duty of ascertaining and determining the facts recited. *Dixon Co. v. Field*, 111 U. S. 83, 4 Sup. Ct. 315; *German Sav. Bank v. Franklin Co.*, 128 U. S. 526, 9 Sup. Ct. 159; *Barnett v. Denison*, 145 U. S. 139, 12 Sup. Ct. 819; *Citizens' Sav. & Loan Ass'n v. Perry Co.*, 156 U. S. 701, 15 Sup. Ct. 547.

But it is argued that the Kentucky enabling act is peculiar, and that the absence of recitals in bonds issued thereunder is immaterial, inasmuch as the circumstances attending the execution of these bonds were such as that there could be no recitals on the face of the bonds importing performance of conditions which were to be complied with after their formal execution and deposit in escrow. This was the view entertained by Judge Barr, who, upon this ground, held that the decision of the trustee, before delivering them to the railroad company, that all precedent conditions had been complied with, precluded the county from contradicting that decision after the bonds had passed into the hands of innocent purchasers. To support this position it is necessary to construe this enabling act as not only empowering the trustee to ascertain and determine whether all conditions subsequent to such deposit had been performed, but that such determination should estop the county, as against an innocent purchaser of the bonds, although no such determination appeared on the bond, either through a recital or indorsement. Certainly none of the numerous opinions of the supreme court affords any express authority for such an interpretation of this act. A careful examination of the opinions of that court will, it is confidently believed, show that, where railroad construction bonds have been issued in violation of the law under which authority was granted, the municipality has never been held estopped to defend upon that ground, unless representations appeared on the bonds themselves importing full compliance with the conditions imposed by the enabling act. The estoppel has been a consequence of recitals or indorsements made by officials empowered to decide the facts recited, and which a purchaser was authorized to rely upon as speaking the truth. The rule which we deduce from the long line

of decisions made by that court as to the application of the doctrine of estoppel to municipal bonds is that where bonds are issued by a municipal corporation under a special and limited authority, imposing restrictions and conditions, but authorizing officials of such municipality to execute and issue such bonds when the conditions precedent imposed have been complied with, and it can fairly and reasonably be gathered from the act that the officials so authorized to execute the bonds were also empowered to ascertain and determine that the requisite facts and circumstances did exist, or all conditions precedent had been complied with, and this determination or decision has been embodied in the recitals of the bonds, a purchaser without other notice, and for value, would have a right to rely upon the truth of the representations appearing on the bond, and need make no further inquiry. *Coloma v. Eaves*, 92 U. S. 484; *Dixon Co. v. Field*, 111 U. S. 93, 4 Sup. Ct. 315; *German Sav. Bank v. Franklin Co.*, 128 U. S. 526, 9 Sup. Ct. 159; *Citizens' Sav. & Loan Ass'n v. Perry Co.*, 156 U. S. 701, 15 Sup. Ct. 547. The principle is that when bonds, on their face, affirmatively import a compliance with the conditions upon which they might lawfully issue, a defense based upon a contradiction of the recitals thus made by an official empowered by the law to decide the facts recited will not be permitted, when the bond has come to the hands of a bona fide holder for value. This doctrine does not apply as between a railroad company receiving such bonds in violation of law, and the municipality itself; nor has it ever been applied in favor of a holder who was not an innocent purchaser for value. *Dill. Mun. Corp.* § 519; *Chambers Co. v. Clews*, 21 Wall. 317-321. False recitals have never been held conclusive as between the original parties, or in favor of purchasers with notice, for the obvious reason that an essential element to an estoppel in pais is that the representation should mislead and deceive one who had a right to rely upon the truth of the representation. It would seem to follow, from the reasons upon which an estoppel is said to arise, that if bonds are issued without recitals, but in violation of law or authority, there exists no reason why they should not be open to defense when action is brought even by one who bought without actual knowledge that they had been issued without performance of precedent conditions. In such case the purchaser buys at his peril, and cannot rely upon his mere ignorance, nor upon the mere fact that the bonds had been issued, and were found in circulation. *Marsh v. Fulton Co.*, 10 Wall. 676; *Buchanan v. Litchfield*, 102 U. S. 278; *Merchants' Exch. Nat. Bank v. Bergen Co.*, 115 U. S. 384, 6 Sup. Ct. 88; *Davies Co. v. Dickinson*, 117 U. S. 657, 6 Sup. Ct. 897; *German Sav. Bank v. Franklin Co.*, 128 U. S. 526, 9 Sup. Ct. 159; *Carroll Co. v. Smith*, 111 U. S. 556, 4 Sup. Ct. 539; *Chambers Co. v. Clews*, 21 Wall. 317-321; *Citizens' Sav.*

& Loan Ass'n v. Perry Co., 156 U. S. 701, 15 Sup. Ct. 547; *Barnett v. Denison*, 145 U. S. 135, 12 Sup. Ct. 819.

The mere fact that the bonds have been issued, and are, in form, negotiable securities, if entitled to any significance whatever, would only raise a presumption that they had been delivered to the railroad company by the trustee in compliance with the terms of the law. Such a presumption would not be conclusive, and the county would not be estopped, even as against one who bought in actual ignorance of the true facts. This seems the well-settled rule, established by *Buchanan v. Litchfield*, *Davies Co. v. Dickinson*, *German Sav. Bank v. Franklin Co.*, and *Citizens' Sav. & Loan Ass'n v. Perry Co.*, heretofore cited. In the case last cited this precise point was urged. Justice Harlan, for a unanimous court, in answer, said: "But it is urged that, the bonds having been executed and issued by those whose duty it was to execute and issue them whenever that could be rightfully done, the county is estopped to plead their invalidity, as between it and a bona fide purchaser for value. This argument would have force if the material circumstances bringing the bonds within the authority given by law were recited in them. In such a case, according to the settled doctrines of this court, the county would be estopped to deny the truth of the recital, as against bona fide holders for value. But this court, in *Buchanan v. Litchfield*, 102 U. S. 278-292, upon full consideration, held that the mere fact that the bonds were issued, without any recital of the circumstances bringing them within the power granted, was not in itself conclusive proof, in favor of a bona fide holder, that the circumstances existed which authorized them to be issued."

Does the act under which these bonds were issued so far depart from the statutes construed in the cases cited as to warrant us in holding that a purchaser need make no further inquiry than would lead him to information that the trustee had made such a decision as that found by the circuit court, and that, if he buys without any inquiry, he is only obliged to prove by evidence extraneous to the bond that such a decision was in fact made? Unless this act can be construed as making the power of the county to issue these bonds dependent, not on the actual construction of this railroad through the county, but upon the decision of this trustee that it had been so constructed, the whole foundation for the argument disappears. This is the test to be applied to every case, even where recitals are relied upon to defeat a defense. In the leading case of *Dixon Co. v. Field*, 111 U. S. 93, 4 Sup. Ct. 315, the rule for construction of such enabling act is thus stated by Mr. Justice Matthews: "But it still remains that there must be authority vested in the officers, by law, as to each necessary fact, whether enumerated or nonenumerated, to ascertain and determine its existence, and to guaranty

to those dealing with them the truth and conclusiveness of their admissions. In such a case the meaning of the law granting power to issue bonds is that they may be issued, not upon the existence of certain facts, to be ascertained and determined whenever disputed, but upon the ascertainment and determination of their existence by the officers or body designated by law to issue the bonds upon such a contingency. This becomes very plain when we suppose the case of such a power granted to issue bonds, upon the existence of a state of facts to be ascertained and determined by some persons or tribunal other than those authorized to issue the bonds. In that case it would not be contended that a recital of the facts in the instrument itself, contrary to the finding of those charged by law with that duty, would have any legal effect."

It is to be observed at the outset that it is significant that while the act provides, in very plain language, that the requisite facts antecedent to the preparation and deposit of the bonds with the trustee shall be ascertained and determined by the county judge, no such explicit statement is found regarding the determination of the subsequent precedent conditions by this trustee. If he is empowered to make any determination whatever, the power is only inferentially granted. So it is significant that no provision is found requiring an indorsement of such decision on the bonds, or the making of some other permanent record that so grave a determination had been made. The very failure to provide in clear terms for a determination by this trustee of the existence of conditions which could only arise after the county judge had parted with the bonds and lost all control over them, and to provide for some method of certifying that determination, affords a strong presumption against the interpretation now contended for. Especially is this noticeable in view of the very well defined distinction between bonds with and without recitals. But it is said that the act authorized the making of "negotiable bonds," and that it ought not to be presumed that the legislature intended that "negotiable bonds" should be forever open to the defense that the railroad had never been completed as required by the act, and that we ought, therefore, to infer that the trustee was authorized to decide as to whether there had been a compliance with this condition, and that his decision should be conclusive. Undoubtedly, the commercial value of such bonds would be much improved if the mere fact of their issuance should, in favor of innocent holders, be conclusive evidence of both the authority to issue them and the regularity of the exercise of that power. This, however, is not the law. If the legislature, by providing that these bonds should be negotiable, meant to cut off all defenses, by the decision of the county judge as to facts antecedent to the deposit in escrow, and by the decision of the trustee as to all facts subsequent to such deposit, it is most

remarkable that it did not provide for some indorsement of that decision on the bonds. As it is, the fact that he ever made such a decision depends upon evidence in pais, and is subject to all the dangers of such evidence. The argument based on the inconvenience of making proof, in every action on such bonds, of the fact of the completion of the railroad, amounts to little, in arriving at the meaning of this act, if the litigant in such a suit is driven to make proof of a decision by the trustee by evidence equally difficult to preserve. But this provision authorizing the issuance of "negotiable bonds" must not be construed alone, nor merely in connection with the provision that the trustee should deliver them when the railroad was completed. There are many considerations which lead us to the conclusion that, while it was undoubtedly the duty of this custodian to inform himself as to the existence of the facts which would justify him in making a delivery of these bonds, yet that information was only for the purpose of enabling him to prudently discharge his duty, and protect himself and the parties interested from the consequence of an illegal and unauthorized delivery. The power of this depository to receive, hold, and deliver these bonds came from the enabling act alone. He was not constituted the agent of either the railroad company or the county, though he was designated by an order of the county judge. This depository need not have been a person at all. A corporate trust company might have been designated. Neither residence, citizenship, nor interest in or knowledge of the locality was essential to the competency of the appointee. The relation, therefore, that this depository bore to the county, is not of such a character as to lead to the presumption that it was intended that he should conclude the county through any agency for or relation to it. The bonds were not to be "delivered" to him, but "deposited" with him. Delivery is just as essential to the existence of a bond, note, or other negotiable instrument as it is to a deed. 1 Daniel, Neg. Inst. § 63 et seq.; Young v. Clarendon Tp., 132 U. S. 353, 10 Sup. Ct. 107. Though they had been prepared and signed, they were absolute nullities until delivered, and they could not take effect as bonds until an authorized delivery. When prepared and signed by the county judge and clerk, and sealed, the power of these officials ceased. They could not perfect them by delivery, because the statute gave them no such power. What the county judge then did was to deposit them with the depository provided under the statute. This was not a delivery, and the bonds continued imperfect obligations until a delivery which could only be made by the custodian when the railroad was completed. The power to perfect them as bonds arose only when the condition mentioned had been performed. A delivery before the railroad was begun would not have completed the making of these bonds, for the power was to

deliver them when it was finished, and the act itself provided expressly that until then the bonds should not be valid, thus affirming the imperfect character of the bonds until a delivery was lawfully made. *Young v. Clarendon Tp.*, cited above. The imperfect character of the bonds, until the condition precedent had been performed, is further made manifest by the direction of the act that they should "be held in escrow and delivered to the said railroad company when it shall become entitled to them by the construction of its road through such county." This term, "in escrow," is one strictly applicable to deeds; and a direction that such imperfect obligations, executed subject to conditions and restrictions, by a maker having no general authority to issue such paper, should be held in escrow, implies that the term was used just as it would be used if the subject-matter of the deposit was a deed. As used, the term implied the state or condition of a deed conditionally held by a third person, to be delivered and to take effect upon the happening of a condition. *Bouv. Law Dict.*; *Black, Law Dict.* When a deed is delivered as an escrow, nothing passes by the deed, unless the condition is performed. *Calhoun Co. v. American Emigrant Co.*, 93 U. S. 124; 6 Am. & Eng. Enc. Law, 867; *Taylor v. Craig*, 2 J. J. Marsh, 449.

Counsel have very ably argued that a distinction exists between the effect of a delivery in violation of the conditions, where the thing in escrow was negotiable paper, and has come to the hands of an innocent purchaser without notice, and for value. 1 *Daniel, Neg. Inst.* §§ 68, 855, 856; *Taylor v. Craig*, 2 J. J. Marsh, 449. Possibly such distinction is sound, though if the purchaser bought with notice that the paper had been held in escrow, and that the trustee had no power to deliver until a condition had arisen, of which the purchaser likewise had notice, he could hardly be regarded as a bona fide holder. Every one dealing with an agent assumes all the risk of a lack of authority in the agent to do what he does. Negotiable paper is no more protected against this inquiry than any other. The purchaser of these bonds bought with notice that they had been held in escrow. The authority of the custodian was not a secret. Herein is the distinction between this case and that class of cases where paper is fraudulently issued by an agent who is authorized to make and issue negotiable paper in the business of his principal, and the question whether the paper issued is in the business of the principal is peculiarly within the knowledge of the agent, and not known to the world or a stranger. In such cases the agent is impliedly authorized to represent the existence of the fact upon which his agency depends. *Farmers' Nat. Bank v. Sutton Manuf'g Co.*, 6 U. S. App. 312, 332, 3 C. C. A. 1, and 52 Fed. 191. It is difficult to see why one who takes such bonds as those in suit is not just

as much obliged to look to the authority of the trustee to deliver as if the subject of the escrow had been a deed. We are to remember that these bonds were imperfect obligations, there having been no delivery when placed in escrow. The question first presented to an intending buyer is this: Have these bonds become executed, valid obligations by delivery? The authority of this trustee to make delivery depended upon the same principles that determine such authority in other contracts, "and is not aided by the doctrine that, when once lawfully made, negotiable paper has a more liberal protection than other contracts in the hands of innocent holders." *The Floyd Acceptances*, 7 Wall. 666-680. "The authority to contract must exist, before any protection as an innocent purchaser can be claimed by the holder." *Marsh v. Fulton Co.*, 10 Wall. 683. But, aside from any distinction between the effect of a wrongful delivery of a deed and of commercial paper upon the title of an innocent purchaser, it seems very clear that the express declaration of the fourth section of the act that these bonds should not be valid obligations until the railroad had been completed through the county, and by the further provision that they should be held in escrow until that event, settles conclusively that the legislature did not mean that the power of the county to so obligate itself should depend upon the mere opinion of the custodian, but upon the actual, objective existence of the requisite fact. The whole scope and tenor of the act leads to the conclusion that the legislature intended to protect the county against any misapplication of these bonds, and therefore limited its power so that the bonds only became its obligations when the contract between the railroad company and the county should become complete. The machinery devised indicates that the purpose was that the railroad should not part with its stock certificates until it had received payment therefor. And, to secure the county against failure to complete the road, all power to issue bonds was made dependent upon its actual construction. To secure the railroad in obtaining the bonds when actually earned, it was provided that when a favorable vote had been cast, and the subscription made, the bonds should be prepared and formally executed, and placed in the hands of a stakeholder, to be delivered when the railroad company had performed its agreement. To secure the county against the possible breach of duty by this custodian, his holding was to be in escrow, and his power to deliver withheld until the actual performance of all precedent conditions. To further protect the county against an unauthorized delivery of the bonds, the act, in plain terms, provided that they should not be valid obligations until the completion of the road. That the custodian was required to give a bond for the due discharge of his trust by no means implies that the county

was to look to this bond in case of an unauthorized delivery. The bond was no more for the benefit of one party than the other. A wrongful delivery, or a fraudulent use of them, might, irrespective of a defense, if sued upon the bonds, involve a costly litigation. It was eminently reasonable that the custodian of such securities, negotiable in form, should give security to protect both parties against negligence, conversion, embezzlement, or any willful refusal to faithfully perform the trust.

It is next insisted that the county should be held responsible upon the principle that, whenever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it. This principle can have no application here, for two reasons: First, the holders of these bonds cannot be regarded as innocent purchasers, inasmuch as they are constructively chargeable with all that inquiry would have disclosed; and, second, the bonds, as bonds of a municipal corporation, are invalid, for want of power to issue them until the actual completion of the railroad in whose aid they were authorized. Neither are the bonds validated because of the payment of interest for a time after their issuance. The question here is not one of mere irregularity in the method of exercising a power. The defense presented goes to the power of the county. There was no authority to issue bonds in aid of the railroad until the road had been constructed through the county. That con-

dition having never been complied with, neither the county court nor the county judge could, by any act of omission or commission, waive its performance. Neither could the county court or any of the county officials validate them by subsequent acts of ratification. If the power to issue them did not exist when they were issued, no payment of interest, or resolution to adopt them, can operate to make them valid contracts. Ratification can only be effective when the party ratifying possesses the power to perform the act ratified. *Marsh v. Fulton Co.*, 10 Wall. 676-684; *Norton v. Shelby Co.*, 118 U. S. 425-451, 6 Sup. Ct. 1121. In *Doon Tp. v. Cummins*, 142 U. S. 366-376, 12 Sup. Ct. 220, the court, through Mr. Justice Gray, said: "A ratification can have no greater effect than a previous authority, and debts which neither the district nor its officers had any power to authorize or create cannot be ratified or validated by either of them, by the payment of interest, or otherwise."

That the county still holds the railroad stock received when these bonds were delivered is no reason for holding these bonds valid. By proper proceedings the railroad company can recover this stock, or compel payment for its value. Justice would demand the return of the stock, or compensation for its value. No such question exists in this case. *Norton v. Shelby Co.*, 118 U. S. 454, 6 Sup. Ct. 1121. The judgment must be reversed and remanded, with direction to render judgment in accordance with this opinion.

STATE (McDERMOTT, Prosecutor) v.
BOARD OF STREET & WATER
COM'RS OF JERSEY CITY et al.

(28 Atl. 424, 56 N. J. Law, 273.)

Supreme Court of New Jersey. Dec. 22, 1893.

Certiorari, at the suit of Allan L. McDermott, against the board of street and water commissioners of Jersey City and others, to review certain resolutions and proceedings of defendant board. Reversed.

Argued November term, 1893, before DIXON and ABBETT, JJ.

Allan L. McDermott, in pro. per. William D. Edwards, for defendants.

ABBETT, J. The certiorari in this case removed into this court, for review, certain resolutions and proceedings awarding contracts for asphalt paving in Jersey City, under proposals received by the board of street and water commissioners. The board advertised for bids for laying asphalt pavement, to be paid for out of the license money collected by the city, as provided in sections 5 and 6 of chapter 134 of the Laws of 1891, (Laws 1891, p. 259,) and further provided for in chapter 82 of the Laws of 1893, (Laws 1893, p. 164.) Bids were received therefor from the Trinidad Asphalt Company and the Barber Asphalt Company. The work would cost \$50,920 under the bid of the Trinidad Asphalt Company, and \$41,982 under the bid of the Barber Asphalt Company. The board did not award the contract to either. They divided it, giving paving to the highest bidder amounting to \$32,805, and giving the lowest bidder paving amounting to \$13,878. The preamble to the resolution awarding portions of the work to each company declares "that the samples [of asphalt] submitted are above the standard requirements, and this board has examined into the financial standing of both bidders, and finds them responsible; and as the prices bid, covering a guaranty of ten years, are advantageous to the city, and as the cost of preparation in establishing a plant to prepare the asphalt for street laying is between twelve thousand and twenty thousand dollars, it is advisable to make the contract of sufficient size as to amount of work to justify the erection of a plant; and as the laying of asphalt pavement has not been heretofore attempted in this city, and as the money to pay for the work on which bids were received is payable out of the excise moneys, and not by assessment, and this board believing it to be for the best interest of the city to divide the work between the bidders with a view of comparison of their work, inasmuch as the Barber Asphalt Paving Company has had the greater experience in laying the pavement, and the Trinidad Asphalt Paving Company has had the greater experience in refining the product, as we are informed: Therefore, resolved," etc. The resolution was presented to the acting mayor on August 19, 1893, and became operative with-

in 10 days thereafter, under section 2 of the supplement to the city charter, approved March 24, 1873, (Laws 1873, p. 400,) he not having vetoed the same. He did not formally approve the same, but in a communication to the board, dated August 29, 1893, after giving his views, states: "I have decided to let the resolution stand."

Our opinion is that under the city charter this improvement was one that was to be borne by the city at large and paid by general tax, and that the proposed work cannot be paid for by assessment for benefits. Under the fifth section of said act of 1891, the board has power, in its discretion, to pave, repair, or improve, at public expense, any part of any street, lane, alley, avenue, or public place already paved, or that has been paved, to be paid for out of the funds raised by the issue of licenses for the sale of spirituous or malt liquors heretofore appropriated under existing laws for that purpose in such city, or which may hereafter be appropriated for that purpose in any such city under the authority conferred by this act. There is a contention in this case as to whether or not the sections of the charter of 1871, under the title "Board of Public Works," which require the contract for paving to be awarded "to the lowest responsible bidder," or section 159 of the charter, under the heading "Finance," is applicable to this case, or whether the provisions of the latter section modify or affect the former provision, or the proper construction thereof. Section 159 provides "that no contract for work or materials shall be entered into, or purchase of personal property be made by, or on account of any board or department of the city government, except after due advertisement, for six days at least, in the official newspapers; whereupon the contract shall be awarded to, or the purchase shall be made of, that responsible bidder who offers the terms most advantageous to the city," etc. In deciding this case it is not necessary to determine which of these provisions are applicable, or whether there is any legal difference between the "lowest responsible bidder" and "that responsible bidder who offers the terms most advantageous to the city," or whether the board, in determining who is a "responsible bidder," is limited to the question of financial responsibility, or may broaden its field of inquiry, and exclude a bidder whose conduct in other public work, or other actions, would render it unwise to trust him to carry out the contract he might make. The board did not act under either of the provisions quoted. It did not award the contract to either the lowest responsible bidder or to that bidder who offered the terms most advantageous to the city. It awarded part of the work to the highest bidder, and part to the lowest bidder. The duty imposed upon the board by the charter was to determine which of these bidders on this work came within the words of the charter. They were both financially

responsible, they both submitted samples of asphalt which were above the standard requirements, and were both treated as bidders who in good faith would perform their contracts to the best of their ability; the only difference between the two being that the highest bidder had the greater experience in laying the pavement, and the lowest bidder had the greater experience in refining the product. It was to one of these that the charter required the board to award the contract. The board seeks to excuse their failure to award the whole of the work to either upon the ground that they believed it to be for the best interest of the city to divide the work between them with a view of comparing their work. The answer to this action is that no such power is conferred upon this board. Its power is limited to awarding the contract to one of the bidders; and it failed to perform that duty when it divided the work unequally, according to its discretion, between the highest and the lowest bidders. The charter having limited the power of the board as to the bidder to whom the contract should be awarded, and as to his qualifications, any departure therefrom is

illegal. *Cory v. Freeholders of Somerset*, 44 N. J. Law, 455.

The board had no right to consider any requirements not set forth in the statute or in the specifications. *Shaw v. Trenton*, 40 N. J. Law, 343, 12 Atl 902. If the board could not determine which of the two was the lowest responsible bidder, or which was that responsible bidder that offered the terms most advantageous to the city, they could have rejected both bids, and have readvertised for the work under the same, or clearer or more detailed, specifications, or, if there were two classes of streets requiring different kinds of work thereon, they could have divided the work, and have asked bids on the different streets.

The prosecutor is a taxpayer of Jersey City, and has a right to question the legality of this action of the board of street and water commissioners. This case is not distinguishable in this respect from *Publishing Co. v. City of Jersey City*, 54 N. J. Law, 439, 24 Atl. 571.

The action of the board in dividing the work among the two bidders is illegal and void.

REUTING et al. v. CITY OF TITUSVILLE
et al.

(34 Atl. 916, 175 Pa. St. 512.)

Supreme Court of Pennsylvania. May 18, 1896.

Appeal from court of common pleas, Crawford county.

Bill by Theodore W. Reuting and others against the city of Titusville and others for injunction. There was decree for defendants, and plaintiffs appeal. Affirmed.

"HENDERSON, J.¹ * * * * *

It is clear from all the evidence that the work in contemplation is the repair and the repaving of a portion of a street which had previously been paved. It is not a case, therefore, of an original paving improvement; and the owners of abutting property are not liable to a compulsory charge therefor. If, however, such owners choose to contribute to the city the principal part of the cost of making the repairs, taxpayers not living upon the street have no ground to complain that 'no part thereof should be paid by the owners of abutting property.' It was held in *Com. v. Mitchell*, 82 Pa. St. 343, that the word 'responsible,' in the act of the 23d of May, 1874, means something more than pecuniary ability; that the duties imposed upon the officers awarding a contract are deliberative and discretionary. In *Douglass v. Com.*, 108 Pa. St. 559, the court said: 'The act of 23d May, 1874, directing contracts to be awarded to the "lowest responsible bidder," has twice been before us for construction. In each it was held that the word "responsible," as used in the act, applies not to pecuniary ability only, but also to judgment and skill. The duties thereby imposed on the city authorities are not merely ministerial, limited to ascertaining whose bid is the lowest, and the pecuniary responsibility of the bidder and his sureties; the act calls for an exercise of duties and powers which are deliberate and discretionary.' The same doctrine is reaffirmed in *Interstate Vitrified Brick & Paving Co. v. Philadelphia*, 164 Pa. St. 477, 30 Atl. 383. If it clearly appears, therefore, that McDonald was a lower bidder than Rouse, in the absence of evidence tending to show that the authorities acted in bad faith or from corrupt motives, they might award the contract to a higher bidder, if considerations of superior skill, promptness, or efficiency on the part of such bidder lead them so to do.

"The objection that the contract was entered into by the committee on streets, and therefore invalid, is not well taken. Municipal corporations act through agents. When the corporation has power to do particular work, it may authorize its agents to enter into contracts, and such contracts will be binding upon the corporation. In *Hitchcock v. Galveston*, 96 U. S. 341, it was held that the city of Galveston was bound by the terms of a con-

tract made on behalf of the city by the mayor and chairman of the committee on streets and alleys, who had been authorized and directed by ordinance to 'enter into and make contract or contracts with proper and responsible parties to fill up, grade, curb, and pave the said sidewalks'; and Mr. Justice Strong, in delivering the opinion of the court, said: 'If the city council had lawful authority to construct sidewalks, involved in it is the right to direct the mayor and the chairman of the committee on streets and alleys to make a contract on behalf of the city for the work. We spend no time in vindicating this proposition.' *Dunn v. Rector, etc.*, 14 Johns. 118; *Story*, Ag. § 4; *Dickerson v. Peters*, 71 Pa. St. 53; *Tied. Mun. Corp.* § 165; *Dill. Mun. Corp.* §§ 132, 374.

"The ordinance and the resolution of July 19, 1895, referring the bids to the committee on streets, empowered that committee to enter into a contract for the completion of the work. The work to be done was set forth in the ordinance, and was therefore determined by the proper city authority. The committee, in executing the contract, acted merely as the agent of the city.

"Under the evidence in this case, it cannot be said that the contract entered into by the city was the incurring of indebtedness within the meaning of the constitutional provision limiting the power of municipal corporations to contract debts. The actual liability created is very small. It is not asserted that the contracts of the owners of abutting property for the payment of their proportionate shares of the cost of material are not available to the city. Through these contracts, the city secures a very large proportion of the cost of the improvement, the whole of which will probably not exceed \$1,600. The current revenues of the city are largely in excess of the requirements of this contract. The testimony is not contradicted that there are several thousand dollars in the city treasury not needed for fixed liabilities, but available for any lawful undertakings of the city. The city has undoubted authority to improve the portion of the streets to be paved, and pay therefor out of the general revenues of the city, if such revenues be sufficient. In *Appeal of City of Erie*, 91 Pa. St. 398, the court quotes with approbation *Dill. Mun. Corp.* § 88, to the effect that when a contract made by a municipal corporation pertains to its ordinary expenses, and is, together with other like expenses, within the limit of its current revenues, and such special taxes as it may legally and in good faith intend to levy therefor, such contract does not constitute an increasing of indebtedness within the meaning of the constitutional provision limiting the power of municipal corporations to contract debts, and adds: 'This, we hesitate not to say, is a sound constitutional interpretation, and, in a similar case, might well be adopted in the construction of our own

¹ Part of the opinion is omitted.

constitution. If the contracts and obligations of a municipal corporation do not overreach their current revenues, no legal objection can be made to them, no matter how great the indebtedness of such municipality may be; for in such case their engagements do not extend beyond their present means of payment, and so no debt is created.' The contract being for the repair of a portion of a street, and clearly within the municipal power of creating a liability, and abundantly covered by funds in the city treasury available therefor, no reason is apparent why the contract should be held invalid upon the theory

that it creates an indebtedness beyond the constitutional limit.²

* * * * *

Roger Sherman, for appellants. Geo. A. Chase, for appellees.

PER CURIAM. The reasons for sustaining the action of the defendants in awarding the paving contract in this case to Rouse are set forth so clearly and forcibly in the opinion of the learned court below that we affirm the decree on that opinion. Decree affirmed.

² Part of the opinion is omitted.

FRAME v. FELIX et al.

(31 Atl. 375, 167 Pa. St. 47.)

Supreme Court of Pennsylvania. March 18, 1895.

Appeal from court of common pleas, Berks county; G. A. Endlich, Judge.

Action by A. Lincoln Frame against George H. Felix, Matthan Harbster, Frank A. Tyson, and Frederick P. Heller, commissioners of the water department of the city of Reading, Howard E. Ahrens, and the city of Reading, for an injunction. From a judgment for plaintiff, defendants appeal. Affirmed.

"ENDLICH, J.¹ * * * * *

"3. The provision that contracts for municipal work shall be given to the lowest responsible bidder does not have sole reference to the mere pecuniary ability of the contractor, but involves a discretion on the part of the municipal authorities in the selection of the agency best fitted for the performance of the work, etc., required. *Com. v. Mitchell*, 82 Pa. St. 343; *Findley v. City of Pittsburgh*, Id. 351; *Douglass v. Com.*, 108 Pa. St. 559; *Interstate Vitrified Brick, etc., Co. v. City of Philadelphia*, 164 Pa. St. 477, 30 Atl. 383. But, that discretion being granted, the purpose of the provision, which 'was based upon motive of public economy, and originated, perhaps, in some degree of distrust of the officers to whom the duty of making contracts for the public service was committed' (*Brady v. Mayor*, etc., 20 N. Y. 312, per Denio, J., at page 316), clearly was 'to secure to the city the benefit and advantage of fair and just competition between bidders, and at the same time close, as far as possible, every avenue to favoritism and fraud in its varied forms' (*Mazet v. Pittsburgh*, 137 Pa. St. 548, 20 Atl. 693, per Sterrett, J., at pages 561, 262, 137 Pa. St., and page 693, 20 Atl.), and to insure 'the accomplishment of the work at the lowest price by subjecting the contract for it to public competition' (In re *Mahan*, 20 Hun, 301, per Brady, J., at page 302). In order to effectuate this purpose, it is manifest that, where something is to be done that is required to be submitted to competition, every essential part of it that goes to make up the whole of it must be submitted to such competition. In re *Paine*, 26 Hun, 431. If any one essential part can be withdrawn from competition, so may others; and in the end it will be found that contracts will be let to the lowest bidder on some single trifling element, while as to all important items there has been no competition at all. Such was, indeed, the case in *Brady v. Mayor*, etc., supra. Upon items making up seven-eighths of the expense of the work to be done no bids were asked; but a pretense of compliance with the statute was made by awarding the contract to the lowest bidder, upon the items making up the

remaining one-eighth of the entire expense. This was held clearly a violation of the law. Nor can it make any difference in principle whether items be withdrawn from competition by permitting (as in *Brady v. Mayor*, etc., supra) the contractor to charge for them as he pleased, or by stating in advance what will be allowed for the same. Thus, in *Re Mahan*, supra, it was held that when the statute requires a public officer to advertise for bids for work to be performed, with a view to awarding the contract to the lowest bidder, he cannot lawfully, in such advertisement, fix an arbitrary price to be paid for certain specified kinds of work, included in that for which the bids are asked; e. g., in advertising for bids for the construction of a sewer, he cannot fix \$4 per cubic yard as the price to be paid by the municipality for all rock excavation. 'If,' says Brady, J., 'the items of rock excavation may be omitted from the contract to be made by arbitrarily stating an allowance for it, the same course may be pursued as to the other items, and the advertisement made, therefore, to cover a few only of the items constituting the whole work to be done.' Accordingly, a contract made upon the basis of such an advertisement, and embodying its objectionable feature, was declared to be illegal. The principle of this decision, affirmed on appeal in 81 N. Y. 621, was followed under similar conditions in *Re Mauger*, 23 Hun, 658; *Re Manhattan Sav. Inst.*, 82 N. Y. 142; *Re Merriam*, 84 N. Y. 596; *Re Metropolitan Gaslight Co.*, 85 N. Y. 528; *Re Paine*, 26 Hun, 431. The fact that the assessments laid to pay the amounts accruing to the contractor upon such contracts were in the earlier cases vacated, in the later simply reduced, is irrelevant here; the reason for the adoption of the latter rule, obviously justified where the work had been done, and the application was to avoid contribution on the part of property holders benefited to its expense, being, together with the rule itself, inapplicable here. It seems, therefore, to be beyond question that, under a provision requiring the submission of contracts for municipal work to competitive bidding, and the awarding of them to the lowest responsible bidder, it is not lawful to fix, in the specifications, on the basis of which the proposals are invited, any arbitrary sum to be paid for any part or item of the work to be done; and that the fixing of such a sum for any part or item of such work renders illegal the entire proceeding and the contract to which it may lead. Nor is it material whether the sum so fixed be or be not, in point of fact, in excess of what it is likely that the competition among the bidders would have made it. Says Brady, J., in *Re Mahan*, supra: 'In the consideration of this case it was thought that, inasmuch as it did not appear that the price allowed for rock excavation by the commissioner of public works was in excess of what would have been demanded by any contractor, the petitioner did not

¹ Part of the opinion is omitted.

sustain any injury by the omission mentioned, and was not aggrieved, therefore, by any substantial error. But reflection upon that theory has led to the conviction that that is not enough to override the plain terms of the statute.' Manifestly this must be so. If not, the requirement to submit public work to competitive bidding could be practically disregarded by municipal officers whenever they might feel disposed to take the chance of being stopped by the taxpayers, and, in case they should be, of finding the ways and means of proving that the expenditure was not in excess of what it would probably have been had they obeyed the statute. Such a condition of the law would be simply intolerable, and cannot for one moment be thought of as a possible thing.

"Now, the difficulty with the specifications and proposed contract in this case is that the former undertake to fix arbitrarily and in advance the price of one of the important elements entering into the expense of the work to be done thereunder, by the stipulation that the contractor shall pay to the persons employed by him in the performance of the contract not less than \$1.50 per day as wages. I am not going to decide, because, as I have shown, it is unnecessary to decide, whether or how much that is in excess of average wages paid to persons employed in the kind of work contemplated in these specifications and this proposed contract. The evidence offered by plaintiff upon this subject might, when objected to, have been excluded, which would have prevented any counter evidence by defendants on the subject. For that reason I have marked as refused the plaintiff's sixth request for findings of fact and his second request for findings of law. All that I am bound to say or that is proper for me to say is that, by attempting to fix in the specifications, on the basis of which proposals were invited, the minimum rate of wages to be paid by the contractor, the water board has withdrawn from possible competition one of the essential elements of the work, every part of which it was required to submit to competition, and that thereby its invitation of proposals for the remainder of the work, its award of the contract therefor, and the proposed execution of said contract have been rendered illegal as in contravention of the mandate of the statute.

"It may, in view of prevailing conditions, be unfortunate that the case before me has arisen at this time, and it may be, as urged at the hearing, that the plaintiff's motives for bringing it here, beyond these disclosed by the record, were not the most commendable. But, the case being here, every question necessarily to be passed upon in its decision is, of course, to be determined upon recognized legal principles, and upon no other consideration; and with the plaintiff's hidden motives the court has nothing to do. *Mazet v. City of Pittsburgh*, 137 Pa. 548,

20 Atl. 693. It is, moreover, to say the least, extremely doubtful, and from what was said upon the argument it would hardly seem to be supposed by any one, that the fixing of a minimum rate of wages to be paid to laboring men in the performance of municipal contracts ever does put into the pockets of a single one of them employed by the contractors one penny more than what his labor would at the time command in the community. The wages of labor are not controllable in that way. If the average wages paid for labor of the kind required are equal to the rate thus prescribed, such a stipulation is an entirely nugatory one. If the average is less, the contractor, whoever he may be, will ordinarily pay just what the average is, and nothing more. In either event the laboring man will be none the better off because of such a stipulation, unless it be enforceable under a valid contract. But I am not now deciding, because it is not before me, that every contract between a municipality and a contractor containing a stipulation as to the minimum rate of wages to be paid by the latter is necessarily void, or that such a stipulation in any such contract is unenforceable. Nor, for the same reason, am I deciding anything as to the right of the city or any department to fix the wages to be paid to laboring men employed directly by it. I am dealing here only with the question of its right to prescribe in its specifications and invitation for bids the rate of wages to be paid by others in the performance of such works as it is required by law to throw open to competitive bidding and to award to the lowest bidder, and with the question of the legality of a contract to be made, in the face of such a requirement, upon the basis of specifications so framed and conditioned in advance of the bidding and awarding of the contract. Neither am I passing upon the city's right, in such work and such contract, to require the employment of American citizens only, and to insist upon the same,—a question which is not material to the decision of this case; and I repeat that I am not deciding that the average rate of wages in this city is or is not \$1.50 per day, or that the labor required in the performance of the work contemplated by the proposed contract could or ought to be obtained at a less rate of wages. I am simply deciding that in asking for proposals as to that work, and in framing its specifications therefor as the basis of such proposals, the water board had no right to fix, in advance, any rate of wages to be paid by the contractor, whether it be too high or too low, and that, therefore, its past and intended action in the premises cannot be sustained.

"Counsel may prepare and submit the proper decree to be entered in this case in accordance with the foregoing decisions."

William J. Rourke, City Sol., for appellants. Stevens & Stevens and Cyrus G. Derr, for appellee.

PER CURIAM. The important question in this case is raised upon the specifications forming part of the proposed contract for the new inlet and pumping station about to be built by the water department of the city of Reading. These specifications require the contractor to employ no one not a citizen of the United States, and to pay no man a less sum for his labor than \$1.50 per day. The point made by the plaintiff is that such specifications are not consistent with the provisions of Act May 23, 1889, art. 4,

§ 6, which require that such work shall be let to the lowest responsible bidder. The learned judge of the court below, in his findings of law marked "(a)," "(b)," "(c)," and "(d)," has sustained the contention of the plaintiff and fully vindicated his decree. We affirm it for the reasons so clearly stated in these findings. The question discussed in the remainder of the opinion, affecting the organization of the water department defendant, is not raised by the assignments of error, and we express no opinion upon it.

✓ COLUMBUS WATER CO. v. MAYOR, ETC.,
OF CITY OF COLUMBUS.

(28 Pac. 1097, 48 Kan. 99.)

Supreme Court of Kansas. Feb. 6, 1892.

Original proceedings in mandamus by the Columbus Water Company against the mayor and council of the city of Columbus to compel the levy of a tax to pay a hydrant rental. Demurrer to the petition overruled.

John N. Ritter, for plaintiff. J. D. McCleverty, for defendants.

GREEN, C. This is an original action in mandamus, brought by the Columbus Water-Works Company against the city of Columbus, its officers, and others, to compel the levy of a tax upon all of the taxable property in the city to pay the hydrant rental upon 50 hydrants for the year 1892, and for an order directing the city clerk to certify the same to the county clerk for the county clerk to place such tax upon the tax-rolls of the county, and for the county treasurer to collect such tax, and pay it over to the city treasurer for the use of the plaintiff. The same parties were before this court to have the hydrant rental levied for the year 1891. The agreed statement of facts and the proceedings in that case are made a part of the plaintiff's petition in this case. The facts being substantially the same as in that case, reference is made to that case for a full statement of all the facts. See Columbus Water-Works Co. v. City of Columbus, 46 Kan. 666, 26 Pac. 1046. Since the decision in that case the city of Columbus has notified the water-works company that it would not receive and pay for water, upon the terms heretofore charged, after the 15th day of August, 1891, and gave notice to its fire department to no longer use water from the public hydrants of the company after said date. The water company notified the city that it would continue to furnish water in accordance with the ordinance passed on the 23d day of March, 1887. The city refused to make any provision for the future payment of hydrant rentals. To the petition of the water company the city has interposed a general demurrer.

To reach a decision in this case the defendant has waived the question as to whether the action of mandamus is the proper remedy or not. The defendant now insists that a city of the second class cannot create a continuing liability covering, as in this case, a period of 21 years, under an exclusive franchise for 99 years. The authority of a city of the second class to make provision to furnish water to its inhabitants and for fire protection has been settled in this state; and a city has the authority to grant a franchise to a person or corporation to establish water-works, and is empowered to rent hydrants from such person or corporation. Gen. St. pars. 787, 817, 1401, 1402, 7185-7190; Wood v. Water Co., 33 Kan. 590, 7 Pac. 233; Bur-

lington Water-Works Co. v. City of Burlington, 43 Kan. 725, 23 Pac. 1068; Columbus Water Co. v. City of Columbus, 46 Kan. 666, 26 Pac. 1046; Manley v. Emlen, 46 Kan. 656, 27 Pac. 844; Dill. Mun. Corp. (4th Ed.) §§ 146, 443, and note to section 568; 15 Am. & Eng. Enc. Law, 1115, 1118, and cases there cited. But it is urged that a contract extending over a period of 21 years cannot be enforced, because the officers of the municipality had no authority to bind their successors for such a length of time; that section 2 of the bill of rights, which provides "that no special privileges or immunities shall ever be granted by the legislature which may not be altered, revoked, or repealed by the same body," is an inhibition against any such power. The leading cases upon this question are in conflict as to whether such a contract as the plaintiff sets out in its petition creates a monopoly or not. The question has frequently arisen between rival light and water companies; sometimes by corporations against cities for the hydrant rentals, when the latter continued to use the water for fire purposes. In this case the city has attempted to cease using the water for any public purpose, and thus relieve itself from all liability on the contract previously entered into to pay a rental of \$3,000 a year for the use of 50 hydrants. The question before us has received the attention of the courts of last resort, both federal and state, of late years, and it is somewhat difficult to reconcile the different decisions. The supreme court of the United States has held "that a gas company, incorporated in 1835, with the exclusive privilege of making and selling gas in New Orleans, its faubourgs, and La Fayette, up to April 1, 1875, could, under an act of the legislature, consolidate with another company; and that a legislative grant of an exclusive right to supply gas to a municipality and its inhabitants through pipes and mains laid in the public streets, and upon condition of the performance of the service of the grantee, is a grant of a franchise vested in the state, in consideration of the performance of a public service, and, after performance by the grantee, is a contract protected by the constitution of the United States against state legislation to impair it." In granting the exclusive franchise to a municipality a state does not part with the police power and duty of protecting the public health, the public morals, and public safety, as one or the other may be affected by the exercise of that franchise by the grantee.

The prohibition in the constitution of the United States against the passage of laws impairing the obligation of contracts applies to the constitution as well as the laws of each state. New Orleans Gas Co. v. Louisiana Light, etc., Co., 115 U. S. 650, 6 Sup. Ct. 252; Water Co. v. Rivers, 115 U. S. 674, 6 Sup. Ct. 273; Louisville Gas Co. v. Citizens' Gas Co., 115 U. S. 683, 6 Sup. Ct. 265; St. Tammany Water-Works v. New Orleans Water-Works, 120 U. S. 64, 7 Sup. Ct. 405.

In *Des Moines St. R. Co. v. Des Moines B. G. St. Ry. Co.*, 73 Iowa, 513, 33 N. W. 610, and 35 N. W. 602, the city had had the authority to grant or prohibit the laying down of street-car tracks within its limits. The court held that, although there was no grant of power in express terms authorizing the council to confer an exclusive privilege in the use of streets, under the circumstances of the case, and to procure a better public service, the council could grant a valid exclusive right for the limited period of 25 years, such contract being necessary to secure the service which it might not otherwise be able to obtain. The court also decided that the constitutional restriction which declared that no exclusive privileges should be granted, except as provided for in the constitution, did not apply to the grant by a city to a person or company of the exclusive right to build and operate street railways.

In the case of *City of Newport v. Newport Light Co.*, 8 Ky. Law Rep. 22, it was held that when a municipal corporation has the power, express or implied, to contract with others to furnish its inhabitants with the means of obtaining gas at their own expense, it has the power to make a contract granting to a corporation the exclusive right to the use of its streets for that purpose for a term of years. The charter of the city did not, in express terms, give the power to the city to grant an exclusive privilege. The court rested its opinion upon the following grounds: First, that the power given the municipality to provide for lighting the city included the power to grant the exclusive right to the use of the streets for that purpose; and, secondly, that the Newport Light Company was invested, in express terms, by a provision contained in the charter, with the right to furnish any city, town, district, or corporation or locality, or any public institution, etc., on such terms as may be agreed upon. The same court has held in a more recent case that, where a party contracts with a city for the exclusive right to remove the carcasses of dead animals therefrom, and to use its public streets for this purpose, the law will protect him in his monopoly, and the work cannot be engaged in by others as a general business enterprise. *City of Louisville v. Wible*, 84 Ky. 290, 1 S. W. 605.

In *New Jersey*, a contract was entered into by Atlantic City with the Atlantic City Water-Works Company for a supply of water, calling for a certain annual payment, without any limit as to time, except that the city might take the water-works at a valuation; and it was held that such a contract was legal and binding on the city. *Atlantic City Water-Works Co. v. Atlantic City*, 48 N. J. Law, 378, 6 Atl. 24. Subsequently it was held by the court of chancery of New Jersey that by an amendment made to the constitution in 1875, which declared that "the legislature shall not pass private, local, or special laws granting to any corporation, association, or

individual any exclusive privileges, immunity, or franchise whatever," the exclusive right could not be granted to a water company to use the streets of a city. *Atlantic City Water-Works Co. v. Consumers' Water Co.*, 44 N. J. Eq. 427, 15 Atl. 581.

In *Tennessee*, it has been held that the granting of the privilege by a municipal corporation, by legislative enactment, to a private corporation, for its exclusive use, for a term of years, is not unconstitutional, and, having been granted, is, during the term of a contract, beyond the reach of subsequent legislative interference. It was decided that, notwithstanding the constitution forbids perpetuities and monopolies, an exclusive privilege to a city to erect water-works was not a monopoly, and that granting an exclusive privilege for a term of years to a private corporation did not render it a monopoly. *City of Memphis v. Memphis Water Co.*, 5 Heisk. 495.

The supreme court of Wisconsin has decided that the legislature could confer upon a private corporation the exclusive right to manufacture and sell gas, and to erect works and lay pipes therefor within the limits of the corporation. *State v. Milwaukee Gas-Light Co.*, 29 Wis. 454. There seemed to be no constitutional limitation when this case was decided, and the court expressly held that the legislature might create a monopoly.

The supreme court of Connecticut, in the case of *Citizens' Water Co. of Bridgeport v. Bridgeport Hydraulic Co.*, 55 Conn. 1, 10 Atl. 170, where the city council of Bridgeport had accepted a proposition from a party to supply the city with water, and granted him, with the power of assignment, the exclusive right to lay pipes in the streets so long as a full supply of pure water should be furnished, and the Bridgeport Hydraulic Company acquired such right by assignment, and expended large sums of money in establishing water-works, held that, so long as this company supplied the city with an abundance of water, the legislature had no power to give another corporation the right to lay pipes in the streets of the city for the purpose of supplying the city with water. The court said "that it was the duty of the court to preserve contracts inviolate, rather than to destroy monopolies. The legislature having in effect authorized the city to make a contract which it desired to make, will not—cannot—now relieve it. Although the state is no party to, and has no interest whatever in, the subject-matter of a contract, if it volunteers to invest a creature of its own, otherwise powerless, with power to make it, the legislature is thereafter concluded in reference to it. It is a lawful contract between two natural persons of full legal capacity sacred from any interference other than judicial construction."

The court of appeals of New York has decided squarely against this doctrine. Under a law passed in 1865, Middletown was authorized to contract with a gas company for street

lighting, but was given no specific power to make a continuing contract. The town made a contract for five years. In 1866 the law of 1865 was unconditionally repealed. The gas company brought an action to recover for gas furnished in 1870, under a contract made with the board of town auditors in 1865. The court said: "Prior to the passage of the act of 1865 the town had no power to cause any of its streets to be lighted with gas or in any other way. By that act such power was conferred upon the defendant. For what time? The learned counsel for the appellant insists for the term of five years, at least, for which the contract was entered into by the plaintiff with the town auditors to furnish gas; and that during that time the legislature had no power to relieve the town, or any part of it, from the expense of lighting all the streets embraced in the contract, whatever the necessity for such relief might be. If the board of town auditors could deprive the legislature of this power for five years, by entering into a contract with the plaintiff for that time, it might for 100 years, by contracting for that period. I think it clear that no such power was conferred by the act upon the town auditors." *Richmond Co. Gas-Light Co. v. Town of Middletown*, 59 N. Y. 228.

In *City of Chicago v. Rumpff*, 45 Ill. 90, it was held that municipal corporations were created solely for the public good, and to that end the corporate authorities were held to a strict exercise of the franchises conferred; that a right to do all slaughtering of animals within the city of Chicago for a specified period was void, because creating a monopoly.

In *Gale v. Kalamazoo*, 23 Mich. 344, where a party had been given the right by contract with the municipality to build and control a market-house for the period of 10 years, the contract was held void, because it created a monopoly. Judge Cooley said in this case: "It is impossible to predicate reasonableness of any contract by which the governing authority abdicates any of its legislative powers, and precludes itself from meeting in the proper way the emergencies that may arise. Those powers are conferred in order to be exercised again and again, as may be found needful or politic; and those who hold them in trust to-day are vested with no discretion to circumscribe their limits or diminish their efficiency, but must transmit them unimpaired to their successors. This is one of the fundamental maxims of government, and it is impossible that free government, with restrictions for the protection of individual or municipal rights, could long exist without its recognition."

The same question was considered in the case of *State v. Cincinnati Gas-Light & Coke Co.*, 18 Ohio St. 262, where the charter of the city conferred on the gas company power "to manufacture and sell gas, to lay pipes, etc., provided the consent of the city council be obtained for that purpose." Under the power given to the city council of Cincinnati "to

cause said city, or any part thereof, to be lighted with oil or gas, and to levy a tax for that purpose," it contracted to invest the defendant with full power and exclusive privilege of using the streets, etc., for the purpose of lighting the city for the period of 25 years, and thereafter until the city should purchase the gas-works. It was held that, while there was no doubt about the city's authority to make the contract for gas-light, there was no necessity for making such right exclusive.

In *Logan v. Pyne*, 43 Iowa, 524, the city of Dubuque had granted to the plaintiff the exclusive privilege and franchise of running omnibuses to carry passengers upon the streets of the city from the 4th day of January, 1872, to the 1st day of January, 1877. The plaintiffs alleged that they had complied with the ordinance granting them such right, and charged the defendant with violating their right by running omnibuses upon the streets of the city, and that he had received large sums of money which the plaintiffs were entitled to under the ordinance granting them such right. The court held: "The powers of municipal corporations are limited to the express terms of the grant, and will not be extended by inference. A municipal corporation can confer exclusive privileges for the prosecution of business only under an express grant of power from the legislature. Monopolies being prejudicial to the public welfare, the courts will not infer grants thereof, refusing to presume the existence of legislative intention in conflict with public policy."

In the case of *City of Brenham v. Brenham Water Co.* (Tex. Sup.) 4 S. W. 143, a city ordinance granted to the water company the right and privilege for the term of 25 years from the adoption of the ordinance of supplying the city of Brenham and its inhabitants with water for domestic and other purposes, and for the extinguishment of fires. By the ordinance the city agreed to pay to the water company \$3,000 per annum during the term of 25 years, as hydrant rental. The charter gave the city power to provide the city with water for the convenience of the inhabitants and the extinguishment of fires. A general law authorized any city in which a water company was organized to contract with it for supplying the city with water. It was held that, while the several laws, taken together, undoubtedly authorized the city to make some contract for supplying itself with water, yet they did not confer on the city express power to make a contract granting the water company the exclusive right to supply the city and inhabitants with water for 25 years at a fixed rate per annum; and, as no such power was necessary to the proper exercise of the power expressly granted, it could not be implied; and that such a contract was unauthorized and invalid. In this case the court said: "We do not wish to be understood to hold that a municipal corporation has no power, in any event, to contract for such things as are consumed in their daily use, for a period longer than the official

term of the officers who make the contract; but we do intend to be understood to hold that such corporations have no power to make contracts continuous in character, in reference to such things, or any others, by which they will be, in effect, precluded from exercising, from time to time, any power, legislative in character, conferred upon them by law."

In *Davenport v. Kleinschmidt*, 6 Mont. 502, 13 Pac. 249, it was held that the grant by a city council of the exclusive right of selling to the city of Helena all the water required by it for sewerage and fire purposes for the period of 25 years, at a minimum rate fixed in the contract, was a monopoly; and this, though the grant does not prevent other people from selling water to private citizens; that a city council has no authority to grant to any person a monopoly, even where no express prohibition is found in the charter or other acts of the legislature. In delivering the opinion in this case, among other things, Mr. Justice McLeary said: "Then, the power to provide the city with water, by making a proper contract with some person to erect water-works, and sell water to the city, being conceded, the next question that presents itself is as to the power of the city to make this particular contract. Is the present such a contract as to be beyond the power of the city council to enter into, so as to bind the municipal corporation? Does this contract create a monopoly? For, if it does, it goes beyond the power of a city council. Monopolies may be created; but they must be called into being by the sovereign power alone. A city council has no authority to grant to any person a monopoly, even where no express prohibition is found in the charter or other acts of the legislature. Monopolies are contrary to the genius of a free government, and ought not to be encouraged by the people or countenanced by the courts, except when expressly authorized by positive law. In many of the state constitutions an announcement of this principle is already explicitly declared. A monopoly is defined by the best and oldest law-writers to be 'an institution or allowance by a grant from the sovereign power of a state, by commission, letters patent, or otherwise, to any person or corporation, by which the exclusive right of buying, selling, making, working, or using anything is given.' 2 Bouv. Law Dict. p. 194; 5 Bac. Abr. 'S'; 3 Co. Inst. 181. It has also been well defined in a late work as follows: 'The popular meaning of "monopoly" at the present day seems to be the sole power (or a power largely in excess of that possessed by others) of dealing in some particular commodity, or at some particular place or market, or of carrying on some particular business.' 2 Rap. & L. Law Dict. 834, 835."

In *Minturn v. Larue*, 23 How. 435, it was held that a charter authorizing the city of Oakland to establish and regulate ferries, or to authorize the construction of the same, gave no power to the city to grant an exclusive privilege. In delivering the opinion of

the court, Mr. Justice Nelson said: "It is a well-settled rule of construction of grants by the legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act, or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public."

In the case of *Jackson Co. Horse R. Co. v. Interstate Rapid Transit Ry. Co.*, 24 Fed. 306, Judge Brewer, now of the supreme bench, held that, in the absence of express authority in its charter, the city of Kansas had no power to grant to a street-railway company the sole right for the space of 21 years to construct, maintain, and operate a railway over and along the streets of such city. In deciding that case the judge observed that he had been charged with the duty of preparing the opinion of this court in the case of *Atchison St. Ry. Co. v. Missouri Pac. Ry. Co.*, 31 Kan. 660, 3 Pac. 284, where the right of a street railway to occupy the streets of the city was challenged; that the opinion there formed by him had not been changed by the able and exhaustive argument of the learned counsel for the complainant. There, as here, the city was given by its charter general supervision and control of the streets of the city, but was not given, in express terms, power to authorize street railroads. In other words, the power vested in the city, and the extent to which that power had been exercised by the city, are alike. The court did not decide the precise question here presented, but expressly declined to give any opinion thereon, holding that, under the grant of general supervision and control of the streets, the city had power to permit the occupation of its streets by a street railroad. But, obviously, there was opened for inquiry the broad question of the power of a city under such a general grant, and that question was made, as I have stated heretofore, the subject of full and careful investigation.

In *Saginaw Gas-Light Co. v. City of Saginaw*, 28 Fed. 529, it was held that authority given "to cause the streets of a city to be lighted, and to make reasonable regulations" with reference thereto, did not empower the city government to grant to one company the exclusive right to furnish gas for 30 years; that the exclusive right to light a city with gas for 30 years was not legally "impaired" by a subsequent contract with another company to light the streets of the city with electricity. This case was decided by Judge Brown, now of the supreme court of the United States, and the authorities were fully reviewed, and the principles involved were elaborately discussed.

In the case of *Omaha Horse Ry. Co. v. Cable Tramway Co.*, 30 Fed. 328, Judge Brewer said: "This rule of construction against the grantee, which applies in all legislative grants, obtains with the greater force in a case like the one at bar, where the grant claimed is not

merely the right to do something, but of a right to exclude all of the rest of the public from doing that thing. He who says that the state has given him a franchise—a right to do that which without that franchise he could not do—will be compelled to show that the franchise—the right claimed—is within the terms of his grant. Much more strenuous must be the demand upon him for clear and explicit language in his grant when he claims that a part of it is not merely the franchise,—the right to do,—but also the right to exclude all others of the public from exercising the same right, and the state, as the representative of the public, from according the same right to another.” See, also, *Proprietors v. Wheeley*, 2 Barn. & Adol. 793; *Charles River Bridge v. Warren Bridge*, 11 Pet. 422; *Perrine v. Canal Co.*, 9 How. 172; *Grand Rapids E. L. & P. Co. v. Grand Rapids E. E. L. & F. G. Co.*, 33 Fed. 659.

The supreme court of Pennsylvania has stated the rule with reference to the grant of franchise in *Pennsylvania R. Co. v. Canal Com'rs*, 21 Pa. St. 22: “When a state means to clothe a corporate body with a portion of her own sovereignty, and to disarm herself to that extent of the power that belongs to her, it is so easy to say so that we will never believe it to be meant when it is not said. In the construction of a charter, to be in doubt is to be resolved; and every resolution which springs from doubt is against the corporation.”

Judge Drummond said, in the case of *Garrison v. City of Chicago*, 7 Biss. 488, Fed. Cas. No. 5,255: “The officers of the city—the members of the council—are trustees of the public. They are clothed with authority to legislate upon public interests. There can be no doubt that the right to regulate the lighting of the streets and to furnish means for the same by taxation is in its nature legislative power. It concerns the whole public of the city. The effect of the contract in question by the city authorities in October, 1869, if valid, was to bind their successors for ten years as to those matters of legislation. If it be conceded that the power existed, as claimed, then it practically follows that at the end of the term, in 1879, a contract may be made by their successors without limit, and which may bind the public indefinitely. I am unwilling to sanction a principle which, in a case like this, would lead to such results. The safer rule is to hold the officers of a municipality to a rigid accountability in the discharge of their trust. In all cases of contracts to run for years, the authority to make them should be clear, because they involve pecuniary liability, and it is a tax upon future property owners of the city. To sustain the contract between the city and gas company in this case would encourage the making of such contracts in the future. It would place it in the power of companies, whose interests were to be affected by them, to multiply them, and to continue them when the public interest demanded they should

cease. To condemn it is to prevent, so far as it may tend to produce that result, the use of influences which look to private, rather than to public, profit. It is better that all parties should understand there is a limit to the power of municipal bodies in such cases.”

The supreme court of Illinois passed upon a question similar to the one now under consideration in the case of *City of East St. Louis v. East St. Louis Gas-Light & Coke Co.*, 98 Ill. 415, where it was held: “It does not appear in the case, nor is it claimed, that the city has exercised its powers by ordinance or otherwise, or manifested a wish to provide differently than as by the contract. So far as the contract has been executed it has been as one for the furnishing of the light during the pleasure of the city. Courts should not destroy the contract made by parties further than some good reason requires. Such an objection is made to this contract. That it interferes with the exercise of the legislative or governmental power of the city over the subject does not require that the contract should be held void, but only voidable, so far as it is executory.” To the same effect is *Decatur Gas-Light & Coke Co. v. City of Decatur*, 24 Ill. App. 544; *Carlyle Water, Light & Power Co. v. City of Carlyle*, 31 Ill. App. 325; *Bradley v. Ballard*, 55 Ill. 413.

It will be seen by this extended review of the authorities, both state and federal, that there are three classes of decisions upon this important question. The supreme court of the United States holds that where there has been an express legislative grant, upon a condition of performance, in consideration of such performance and public service, after performance by the grantee it becomes a contract which is protected by the constitution of the United States. A number of states, notably Tennessee and Wisconsin, have said that such a grant is not a monopoly, and is fully protected, and held as inviolable as a contract between private parties or private corporations; while other states and some federal courts have held that municipal corporations cannot make contracts beyond the legislative life of its mayor and governing body. We are not ready to indorse the latter class of decisions, or go to the full extent of the former. We are not inclined to the opinion that the question that the city has attempted to grant an exclusive franchise is necessarily material in this case, under its present status. It is not a question between contending water companies, as to which shall have certain privileges. No company is offering to furnish a better supply of water upon more reasonable terms. Hence we do not think the franchise should now be held void by reason of its exclusiveness. That question should not be decided until it is before us in a case in which it would be proper for us to pass upon it. Again, if we are to follow former precedents, much of the argument of counsel for the city is lost wherein he contends that the franchise claimed is in direct conflict with section 2 of the bill of rights.

This court has said, speaking through Mr. Justice Brewer, that the words "no special privileges or immunities" refer to privileges or immunities of a political nature. *Atchison St. Ry. Co. v. Missouri Pac. Ry. Co.*, supra.

It is conceded that the plaintiff has only been furnishing water to the city of Columbus for a period of a little more than four years; the works having been tested and accepted on the 28th day of December, 1887. So far as the plaintiff can make it, the contract is an executed one; and during the period of its existence, while the city used the hydrants and paid the rental, it became an executed contract so far as the city was concerned. Now, the city having, by its contract and permission, invited the expenditure of a large sum of money by the plaintiff in erecting its works, in order to give the city such fire protection as it had agreed to pay for in the manner indicated in the ordinance, should not the water company be given a reasonable time in which it might have the benefits of a contract which had been agreed to and recognized? Or shall we say that, because there was no express authority to make the contract for the period of 21 years, it is therefore void? To hold to the latter proposition, when the parties cannot be placed in the same condition they were in before the contract was executed, would be a violation of the plainest rules of good faith. The plaintiff alleges that in pursuance of the contract it has expended large sums of money in constructing its water plant; that bonds to the amount of \$60,000 have been issued, which are secured by a mortgage upon said plant; that the rentals from private consumers of water and other resources are not sufficient to pay the interest on the bonds as the coupons mature, and it has no means of paying the interest except from the rentals which the city had contracted to pay; that the city has no other supply for water, and no other franchise has been granted; and that the city and its inhabitants are without protection from fire, except as provided by the plaintiff; that the city is practically the same size it was in 1887, and the taxable property is substantially the same now as then. As the case stands here upon demurrer, of course we assume these facts to be true.

In *Hitchcock v. Galveston*, 96 U. S. 341, the city council had contracted with the plaintiffs to build certain sidewalks, to be paid for by the city in bonds. The work was partly performed, but the city council stopped the work and prevented its completion. An action was brought for a breach of the contract. It was urged that the city had no power to make such a contract, and it had no authority to issue the bonds of the city. The court said: "It is enough for the plaintiffs that the city council have the power to enter into a contract for the improvement of the sidewalks; that such contract was made with them; that under it they have proceeded to furnish material and do work, as well as to assume liabilities; that the city has received, and now

enjoys, the benefit of what they have furnished; that for these things the city promised to pay; and, after receiving the benefit of the contract, broke it. It matters not that the promise was to pay in a manner not authorized by law. If payment cannot be made in bonds, because their issue is ultra vires, it would sanction rank injustice to hold that payment need not be made at all. Such is not the law. The contract between the parties is in force so far as it is lawful." The court cites in support of the decision the case of *State Board of Agriculture v. Citizens' St. Ry. Co.*, 47 Ind. 407, where the court held that "although there may be a defect of power in a corporation to make a contract, yet, if a contract made by it is not in violation of its charter, or of any statute prohibiting it, and the corporation has by its promises induced a party, relying on the promises and in execution of the contract, to expend money, and perform his part of the contract, the corporation is liable on the contract."

We do not wish to be understood as upholding the contract upon which the plaintiff relies for any particular period of time, but we are not prepared to say that it is void. Neither would we apply the rule with the same strictness to municipal corporations that should govern private corporations organized for gain. Courts should be governed by the conditions and circumstances surrounding municipalities, and regard them as branches of the sovereign government. When improved methods are offered, which will give to the city better facilities in the way of water, lights, and travel, or in any other manner give to its inhabitants increased safety and protection, the governing power of the city should be free to act; but until such time comes courts should not set aside contracts which have been, in part at least, executed, unless for some good cause. The circumstances surrounding each particular case will have to largely govern, and no fixed and determinate rule can be established. The facts, as presented by the pleadings, are not sufficient, in our opinion, to authorize us to say that the contract entered into between the city and the water-works company is ultra vires, and should not, therefore, be enforced.

To show the limit to which the supreme court of the United States has gone in upholding franchises of a similar nature to the one under consideration, we quote the language of Mr. Justice Davis, in *Binghamton Bridge*, 3 Wall. 51: "The purposes to be attained are generally beyond the ability of individual enterprise, and can only be accomplished through the aid of associated wealth. This will not be risked unless privileges are given and securities furnished in an act of incorporation. The wants of the public are often so imperative that a duty is imposed on the government to provide for them; and, as experience has proved that a state should not directly attempt to do this, it is necessary to confer on others the faculty of doing what

the sovereign power is unwilling to undertake. The legislature therefore says to public-spirited citizens: 'If you will embark with your time, money, and skill in an enterprise which will accommodate the public necessities, we will grant you, for a limited period, or in perpetuity, privileges that will justify the expenditure of your money and the employment of your time and skill.' Such a grant is a contract with mutual considerations, and justice and good policy alike require that the protection of the law should be assured to it." Mr. Justice Valentine, in the case of *Brown v. City of Atchison*, 39 Kan. 54, 17 Pac. 465, speaking for this court, after a review of the authorities upon the question of corporate power, deduced the following principle: "Where a contract is entered into in good faith between a corporation, public or private, and an individual person, and the contract is void, in whole or in part, because of a want of power on the part of the corporation to make it or to enter into it, but the contract is not immoral, inequitable, or unjust, and the contract is performed in whole or in part by and on the part of one of the parties, and the other party receives benefits by reason of such performance over and above any equivalent rendered in return, and these benefits are such as one party may lawfully render and the other party lawfully receive, the party receiving such benefits will be required to do equity towards the other party by either rescinding the contract and placing the other party in statu quo, or by accounting to the other party for all benefits received, for which no equivalent has been rendered in return; and all this should be done as nearly in accordance with the terms of the contract as the law and equity will permit." As this court has already decided, the city of Colum-

bus had the authority to make a contract for the supply of water for protection against fire; and, as such contract has been entered into and carried out in part, we are not prepared to say that it is void because the authorities of the city did not possess the power to make a contract for the period of 21 years. If the contract had only been executory, and no rights had accrued, we might hold otherwise. As to the ratification of irregular contracts, see authorities cited in *Columbus Water-Works Co. v. City of Columbus*, 46 Kan. 677, 26 Pac. 1046.

It is forcefully urged by counsel for the city that under paragraph 796 of the General Statutes of 1889 the contract with the water company is void; that a city of the second class cannot create a valid liability which requires a tax to be levied in excess of 4 per cent. The paragraph reads: "At no time shall the levy of all the city taxes of the current year for general purposes, exclusive of school taxes, exceed four per cent. of the taxable property of the city, as shown by the assessment books of the preceding year." It appears from the pleadings in the former case that the city tax for the year 1890 was 27½ mills. This does not include the state and county tax, and we think the limitation only applies, as stated, to the city taxes of the current year for general purposes. Adopting this construction of the law, the position of counsel is not tenable. It is recommended that the demurrer to the petition be overruled.

PER CURIAM. It is so ordered; VAL-
ENTINE and JOHNSTON, JJ., concurring.

HORTON, C. J. I concur in the judgment recommended to be entered by this court, but not in all stated in the opinion.

OSHKOSH CITY RY. CO. et al. v. WINNEBAGO COUNTY et al.

(61 N. W. 1107, 89 Wis. 435.)

Supreme Court of Wisconsin. Feb. 5, 1895.

Appeal from circuit court. Winnebago county; George W. Burnell, Judge.

Action by the Oshkosh City Railway Company and others against the county of Winnebago and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

The action is to set aside a special assessment tax, to cancel a tax certificate issued thereon, and to restrain the execution of a tax deed on such certificate. The plaintiff is a railway company, having a right of way and roadbed and tracks along Ceape street, in the city of Oshkosh, near the center of the street. The board of aldermen paved and curbed Ceape street with cedar blocks. It charged a part of this improvement against the plaintiff's right of way and roadbed. That the assessment was unpaid, and the right of way and roadbed were afterwards sold, and a tax certificate issued to the county of Winnebago. There was a finding and judgment for the plaintiff, from which the county appeals.

H. Fitzgibbon and H. I. Weed, for appellants. Felkers, Stewart & Felker, for respondents

NEWMAN, J. No question is made of the power of the legislature to make the right of way of a railroad company subject to special assessment for the improvement, by paving, of a street in a city, to the extent, at least, to which it is benefited by the improvement. It is not so clear that it may authorize an assessment for an improvement which, from the nature of the property, cannot benefit it. Dill. Mun. Corp. 761-768. In this case the important question is, has the legislature made property situated as this property is subject to special assessment for paving the street in which it lies? The answer to this question depends altogether upon what may be the proper interpretation of the statutes which are thought to give the power to make such assessment to the city. The first consideration is whether these statutes are to have a liberal construction or a strict construction. It is believed to be elementary that every statute which is in derogation of the right of property, or that takes away the estate of the citizen, ought to be construed strictly. It should never be enlarged by an equitable construction. Suth. St. Const. § 363; 23 Am. & Eng. Enc. Law, 383 et seq., and cases cited in notes. The power to make local assessments is a part of the power of taxation. It is a sovereign power. It resides alone in the legislature. It can be delegated, but only by plain and unambiguous words. Statutes delegating such authority will be construed strictly; nothing will be taken by presumption or intendment; and such statutory powers must be strictly pur-

sued. Suth. St. Const. § 365, and cases cited in notes 4 and 5; Curtis v. Supervisors, 22 Wis. 167; Potts v. Cooley, 51 Wis. 353, 8 N. W. 153, and cases cited. The affirmative is on the city. It must produce express power in legislative enactment, and show that it has followed, strictly, every legal requirement. In re Second Ave. M. E. Church, 66 N. Y. 395. Any doubt or ambiguity arising out of the terms used by the legislature must be resolved against the power. Minturn v. Larue, 23 How. 435. Guided by these principles of interpretation, the statutes which are claimed to be authority for the levy of this assessment are to be tested. First is section 1836, Rev. St., which requires every corporation which owns or operates a railroad in the street of a city to restore the street to its former condition, so that its usefulness shall not be materially impaired, and "thereafter maintain the same in such condition against any effects in any manner produced by such railroad." It would certainly require a very wild flight of imagination to discover in this statute any plain power to make a local assessment on the railroad corporation to improve the street. The statute, in terms, only requires the corporation to "maintain" the street, not to improve it. Then there is section 1038, Rev. St. This is in the chapter relating to general taxation. It is no part of the purpose of the chapter to provide for special assessments. The section relates especially to "property exempt from taxation." It provides generally that "the track, right of way," and the other property named, belonging to railroad corporations, shall be exempt from taxation. This is followed by this exception or proviso: "Except that it shall be subject to special assessment for local improvements in cities and villages." It is as if the legislature had said "the track, right of way," and other property of railroad corporations shall be exempt from taxation, "provided, nothing in this section shall be construed as exempting such property from local assessment for improvements in cities and villages." The proviso in no way changes the force or meaning of the purview. It neither enlarges or subtracts from it. Such property would have been and remained liable to local assessments if the proviso had been entirely omitted. Dill. Mun. Corp. § 777. The proviso was added for reasons of caution. It is one office of a proviso to exclude some possible ground of misinterpretation of the act. Studley v. Oshkosh, 45 Wis. 380. But if this statute should be held to be an affirmative statute, enacted with a view to make property of this class subject to local assessments, it is, at most, a mere general declaration that such property shall be subject to local assessments for improvements, in cases to be provided by law; for it has no self-executing force. The cases in which it shall be liable must be defined and limited, as well as the manner of the assessment directed, before

such property can really be made subject to such assessments. So the real power to make this assessment, if it exists, is to be found in some other exercise of legislative power. If it exists, it should be found in the charter of the city of Oshkosh. This is chapter 183 of the Laws of 1883. Subchapter 10, § 3, gives power to the aldermen to make such improvements as were made in Ceape street, and to "charge the cost and expense thereof to the center of the street or alley to any lot or lots fronting or abutting on such street or alley." These are all the words in the city charter which are claimed to evince the legislative intention to subject the plaintiff's right of way in Ceape street to local assessment for paving the street. This statute, in words, gives power to charge the cost of the improvement only against "lots" which front or abut upon the street improved. Waiving all question of strict or liberal con-

struction, the court must, at least, be able to see in the words used a legislative intention to make the plaintiff's right of way liable to the assessment. Even with the definition stating that the term "lot" may include "a strip of land," it is not easy to see that the term "lot" describes the plaintiff's right of way, with its roadbed and tracks, wholly within the street, and not outside of it, and of indefinite length. Nor is it easy to see that this strip of land, even if it could be termed a "lot," fronts or abuts upon the street; for it is wholly within and a part of the street. The conclusion seems to be irresistible that, by the use of the words it has chosen, the legislature has not intended to subject the rights of way of railroad companies, in the city of Oshkosh, to such special assessment. Certainly, it is not clear that the lawmaking power did so intend. The judgment of the circuit court is affirmed.

(48 La. Ann.)

NELSON et al. v. MAYOR, ETC., OF TOWN OF HOMER. (No. 12,016.)

(19 South. 271, 48 La. Ann. 258.)

Supreme Court of Louisiana. Feb. 10, 1896.

Appeal from judicial district court, parish of Claiborne; Allen Barksdale, Judge.

Action by A. T. Nelson and others against the mayor and selectmen of the town of Homer. Judgment for defendants, and plaintiffs appeal. Reversed.

J. W. Holbert, for appellants. John A. Richardson, for appellees.

McENERY, J. The plaintiffs, who are taxpayers in the town of Homer, bring this suit to annul certain ordinances of the corporation establishing a high school, and the ordinances assessing and appropriating five mills of the taxes of 1895 for the support and maintenance of the school. The reason for the nullity of the ordinance is that the corporation of the town of Homer was without power and authority to enact said ordinances, to levy said amount, and appropriate the same for educational purposes. The defense is that under article 209 of the constitution municipal corporations have the power and authority to levy and collect taxes to the amount of 10 mills for municipal purposes, and that an assessment for educational purposes is a municipal regulation. It is further alleged that the corporation, in accordance with Act No. 110 of 1880, amended its charter, and incorporated this power in it. Under the general welfare clause of the charter, as originally granted, the district judge rendered a judgment in favor of defendants, maintaining the legality of the ordinances and the assessment and appropriation of the tax. The plaintiffs appealed.

Article 209 of the constitution, in the proviso to said article, authorizes parishes and municipalities to increase the rate of taxation for the purpose of erecting and constructing public buildings, bridges, and works of public improvement. Under this article it would be a wide interpretation to include within its meaning the establishment of and the support of a public school. Public education is declared by the constitution to be an affair of the state, and it assumes the whole responsibility of public education. It will be unnecessary to discuss the question whether the legislature by a general law could authorize local assessments for educational purposes. This question is not raised. But it is certain from the provisions of the constitution that the legislature is without power to confer this privilege upon any particular political

corporation. Const. art. 46. The power claimed to levy this tax under the amendment of the charter of the constitution is unfounded. The general assembly is prohibited from passing any local or special law creating corporations or annulling, renewing, or extending or explaining the charters thereof, except as to the city of New Orleans and the creation of levee districts. Article 46, Const. Act No. 110 of 1880 was, in consequence of this prohibition, enacted, authorizing existing corporations, by a vote of its members, to alter, change, and amend their charters. There is no power conferred by the act upon any corporation to incorporate within its charter any grant of any privilege not existing in the original charter. Corporations are the creatures of legislative will, and can do no act not authorized by their charters, unless it is by implication necessary to carry out conferred powers. In the original charter there was no grant of any right to the corporation of Homer to erect a school building and maintain a high school. It cannot, by its own act, usurp powers not granted. There was no authority under the act for the corporation to so amend its charter as to authorize the levying of a tax for the maintaining of a high school, or for any other educational purpose. *Torian v. Shayot*, 47 La. Ann. 589, 17 South. 203; *Cook v. Dendinger*, 38 La. Ann. 261. The general welfare clause of the corporation cannot be so construed as to permit the exercise of an original power, necessary to be granted in the first instance by legislative will. Under this clause many useful and necessary exercises of power are allowed, but they are all referable to powers granted, or those necessarily implied. The subject of education is an important matter, and it is so treated by the state, as it seems to be jealous of the exercise of the power by subordinate political corporations, as it has not granted local self-taxation for this purpose. This may be the keystone to a successful educational system, but the collective people in convention did not so regard it, otherwise it would have found a place in the educational system of the state, and protection in the permanency of the organic law. A high school is not essential to municipal government. A system of education is not a part of municipal regulation, and the power of the corporation to establish a public school cannot be inferred from any power necessary for municipal existence. The judgment appealed from is annulled, avoided, and reversed, and it is now ordered that there be judgment for plaintiffs decreeing the nullity of the ordinances mentioned in the petition, and on which the taxing power and assessment is exercised for the levying of the five-mill tax complained of.

Handwritten note: Held 1896 by the court.

PAYNE et al. v. VILLAGE OF SOUTH SPRINGFIELD.

(44 N. E. 105, 161 Ill. 285.)

Supreme Court of Illinois. May 12, 1896.

Appeal from Sangamon county court; George W. Murray, Judge.

Proceeding by the village of South Springfield for the levy of a special tax for the construction of a sewer. From a judgment confirming the levy made, Edward W. Payne and others, property owners, appeal. Reversed.

McGuire & Salgenstein and A. S. Murray, for appellants. Conkling & Grout, for appellee.

WILKINS, J.1 * * * * *

The objection to the validity of the ordinance most strongly insisted upon is that it is unreasonable and oppressive. It cannot be denied that the sewer provided for in the ordinance is a local improvement, within the meaning of section 1, art. 9, c. 24, Rev. St. It is admitted that this court has frequently sustained special assessments for the construction of sewers, and clearly that could only have been done on the ground that they were local improvements. Being such, authority to make them by special taxation, as well as by special assessment, is expressly given by section 1, supra. In *City of Galesburg v. Searles*, 114 Ill. 217, 29 N. E. 686, it was expressly held that an ordinance providing for the construction of a sewer, to be paid for one-half by general tax and one-half by special tax, to be levied on contiguous property, was valid. It is true that ordinance provided that the special tax should be levied in proportion to the benefits accruing to the contiguous property, but it was said: "Having determined to raise only one-half the cost of the improvement by special taxation of contiguous property, it was open to the city council to adopt which one of the various modes of special taxation of the property they saw fit,—whether according to frontage of the property, value, benefits received, or otherwise." That grading or paving a street, and the laying of sidewalks are local improvements, to pay for which a special tax may be levied upon contiguous property, in proportion to frontage, has been the law of this state since the decision in *White v. People*, 94 Ill. 604. That the benefits accruing to property contiguous to a street in which a sewer, like the one contemplated by this ordinance, is laid, differ in kind, and perhaps in degree, from those derived from improving the street itself, or laying sidewalks, is admitted; but the benefits are certainly no less local to the adjacent property in

the one case than in the other. But it is said a special tax levied on the lots of land lying on the street in which the sewer is laid, in proportion to frontage, in this case, operates unjustly, and is therefore unreasonable. We said, in *White v. People*, supra: "Whether or not the special tax exceeds the actual benefit to the lot is not material. It may be supposed to be based on a presumed equivalent. The city council have determined the frontage to be the proper measure of property benefits. That is generally considered as a very reasonable measure of benefits in the case of such improvements, and though it does not in fact, in the present case, represent the actual benefits, it is enough that the city council have deemed it the proper rule to apply." This doctrine has been assailed time and again, but never departed from by this court.* It was said, in *City of Springfield v. Green*, 120 Ill. 269, 11 N. E. 261, after citing numerous decisions: "If it be possible to settle any question by repeated decisions, all the same way, the present surely ought to be regarded as finally and irrevocably settled." And in the late case of *Chicago & A. R. Co. v. City of Joliet*, 153 Ill. 649, 39 N. E. 1077, it was reannounced, with a citation of numerous later decisions to the same effect. Counsel seem to understand that the cases of *City of Bloomington v. Chicago & A. R. Co.*, 134 Ill. 451, 26 N. E. 366, and *City of Bloomington v. Latham*, 142 Ill. 462, 32 N. E. 506, are to the contrary. This is a misconception of those cases. In each of them the ordinance before the court showed upon its face that the property sought to be taxed was not only not benefited by the improvement, but actually damaged thereby. There the question was not whether the tax exceeded the benefits, but whether a special tax could be legally levied at all; it appearing that no benefits whatever could possibly accrue to it. Here it is not pretended that the property of objectors will not be benefited by the sewer, nor is it claimed that the improvement is not one proper to be made. The sole objection is that, by adopting the system of levying the special tax by frontage instead of according to benefits to be estimated by commissioners, injustice to property holders has been done, and, as we have seen, that question was not open to consideration in the county court, nor is it subject to review here. We do not think the position that the ordinance is invalid, because it does not provide for the levying of a special tax upon the railroad right of way, is tenable. The railroad right of way is not, in any proper sense, contiguous to the sewer, which simply passes through it underground.¹

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¹ Part of the opinion is omitted.¹ Part of the opinion is omitted.

* But the frontage assessment is not unreasonable, and other sections, while it is sound elsewhere, may not be with certain qualifications.

PALMER et al. v. CITY OF DANVILLE.

(38 N. E. 1067, 154 Ill. 156.)

Supreme Court of Illinois. Nov. 26, 1894.

Error to Vermillion county court; John G. Thompson, Judge.

Petition by the city of Danville for confirmation of a special tax. Levin T. Palmer and others filed objections. There was judgment of confirmation, and the objectors bring error. Reversed.

D. D. Evans and E. R. E. Kimbrough, for appellants. Wm. J. Calhoun, for appellee.

CARTER, J. This writ of error is prosecuted to reverse the judgment of the county court of Vermillion county, confirming a special tax levied to pay the cost of certain sewer and water service pipes laid for house connections with the sewer and water mains in Main street, in the city of Danville. Numerous objections were filed and insisted on in the county court, and are renewed here by plaintiffs in error, but it will not be necessary to consider them all in the disposition of the case.

It is urged in the objections, among other things, that the several water and sewer service pipes were intended for the use of the individual lot owners, and that the public could have no access to, use of, or interest in them whatever, and that, therefore, they did not constitute a "local improvement," within the meaning of the law. We do not regard this objection as well taken. All of the several water and sewer connections must be considered together, as one entire work, and, when taken in connection with the use of the mains which had already been provided, a local improvement especially useful and beneficial to the residents on the contiguous property, and generally useful and beneficial to the city, was provided for. At least, the city council must have so regarded it in passing the ordinance, and we do not think there was any lack or abuse of power in the respect mentioned. *Warren v. City of Chicago*, 118 Ill. 329, 11 N. E. 218; *Louisville & N. R. Co. v. City of East St. Louis*, 134 Ill. 659, 25 N. E. 962; *City of Chicago v. Blair*, 149 Ill. 310, 36 N. E. 829, and cases cited.

It is also urged that, as the water mains mentioned in the ordinance belonged to a private company, the city had no control over them, except by virtue of the police power, and by virtue of rights reserved in granting the license to lay the mains in the street, and that such reserved rights did not include the right in the city to make water connections for private individuals, as a local improvement. It was stipulated in the court below, between the parties, that the water main is maintained, under the ordinances of the city, for the use of the city and its inhabitants; and the question is presented whether the mere fact that this main belongs to a private company, though located in a public street, and maintained for the use of the city and its in-

habitants, under the provisions of an ordinance of the city, renders the ordinance and the proceedings under it in this case void. We do not think it does. The ordinance under which the water main was laid and is maintained was not given in evidence, and we must presume, in the absence of any evidence to the contrary, that the city has preserved and guarded its own rights and those of its inhabitants in its contract with the water company. These water-pipe connections are a part of the entire improvement, and may be regarded as important in making the sewer and its connections more available and useful than they otherwise would be. In making this improvement so that it would be most useful and beneficial to the public and the property owners, the city had a large discretion, with the proper exercise of which the courts cannot interfere. *Lightner v. City of Peoria*, 150 Ill. 87, 37 N. E. 69. It may be conceded that, to make the water-pipe connections available or beneficial, it was the duty of the city council to provide water mains to convey water to them,—in other words, to make provision for a supply of water; otherwise, the connections would be useless, and would not be an improvement at all, of benefit to any one. *Hutt v. City of Chicago*, 132 Ill. 352, 23 N. E. 1010. This duty the city has discharged, and doubtless in the manner that seemed best for itself, the property owners interested, and the inhabitants generally; and whether it should lay the main and furnish the water itself, or hire a private person or corporation to do so, is a question for the city council to decide, and not for the courts. It might be that if the contract with the water company were in the record, and the court could see that its terms and provisions were such as to make the ordinance providing for this improvement oppressive and unjust, in levying this tax to make connections with the water main which would never be of benefit to the contiguous property, this court would hold the ordinance invalid; but the record shows nothing more on this subject than that the water company owning the main maintains it, under ordinances giving it such right, for the use of the city and the inhabitants. In *Holmes v. Village of Hyde Park*, 121 Ill. 128, 13 N. E. 540, followed by *Hunerberg v. Same*, 130 Ill. 156, 22 N. E. 486, and *Leman v. City of Lake View*, 131 Ill. 388, 23 N. E. 346, it was decided that the owner of property specially assessed for the purpose of improving a street cannot be heard to urge as an objection to the assessment that the proposed street is located on private property, and that the city has not acquired title thereto. And it was held that the assessment may be levied before the title to the proposed street has been acquired by condemnation or otherwise. In *Leman v. City of Lake View*, 131 Ill. 391, 23 N. E. 346, this court said: "The corporate authorities of cities and villages may levy special assessments for the improvement of a proposed street before acquiring title to the soil by condemnation or otherwise, and may afterwards take the

necessary steps to condemn the land, and have the compensation and damages to be paid assessed; and the owner of the property specially assessed for grading and paving such street cannot interpose the objection to the confirmation of such assessment that the city or village had not acquired title to the soil to be

graded and paved." See, also, Village of Hyde Park v. Borden, 94 Ill. 26. These cases, though not precisely in point, lend force, by analogy, to the views here expressed.¹

* * * * *

¹ Part of the opinion is omitted.

BUCKLEY v. CITY OF TACOMA et al.
(No. 1,233.)

WINGATE et al. v. SAME et al.
(No. 1,234.)

(37 Pac. 441, 8 Wash. 253.)

Supreme Court of Washington. June 27, 1894.

Appeal from superior court, Pierce county;
W. H. Pritchard, Judge.

Action by J. M. Buckley and by Robert Wingate and others against the city of Tacoma and others to set aside assessments for local improvements. From judgments for defendants, plaintiffs appeal. Reversed.

Doolittle & Fogg, for appellant Buckley. S. C. Milligan, for appellants Wingate et al. F. H. Murray and S. A. Crandall, for respondents.

STILES, J. The enabling act for cities of the first class (Gen. St. § 520) provides that any such city framing a charter for its own government shall have power (subdivision 10) "to provide for making local improvements, and to levy and collect special assessments on property benefited thereby, and for paying for the same or any portion thereof;" (subdivision 13) "to determine what work shall be done or improvements made at the expense, in whole or in part, of the owners of the adjoining, contiguous, or proximate property, or others specially benefited thereby, and to provide for the manner of making and collecting assessments therefor." Section 52 of the charter of Tacoma begins thus: "The city government of Tacoma shall have powers, by ordinance and not otherwise," repeating the language of the statute, with the exception of the last clause of subdivision 13, for which there is substituted: "Provided the manner of making and collecting assessments therefor shall be as prescribed in this charter." But when the reader of the charter gets to article 12, which is a complete code of street improvement and assessment law, he finds that not an ordinance, but a resolution, is required. Appellants make a strong point of this, and insist that anything less than an ordinance renders the whole proceedings leading up to a street assessment void. But the learned judge who heard the case below held that the specific provisions of the article mentioned must govern the general ones of section 52, and we quite agree with his conclusion. Although the enabling act conferred the power, it did not undertake to say how it should be exercised. Very often such powers are made effective through general ordinances, but here the charter framers, and thereby the city en masse, have seen fit to prescribe even a more solemn and formal law on the subject by providing for a charter system which is rigidly binding upon both the legislative and executive powers of the corporation. We do not see how any substantial injury can be done, either, through this construction, and

it remains merely to examine the record, to see how the mandates of the charter have been carried out.

The charter provides for the establishment of a board of public works, with a clerk, and specifically delegates to it many executive duties, and the appointment of sundry officers, among whom is a city engineer, who is required to make all necessary surveys of public work under the direction of the board. Article 12, so far as is necessary for the consideration of this case, reads as follows:

"Sec. 135. All applications for establishing or changing the grade of any street or streets, the improvement of public grounds or buildings, the laying out, establishing, vacating, closing, straightening, widening or improvement of any street, road or highway, or the laying out or opening of any new street through public or private property, and for all public improvements which involve the necessity of taking private property for public use, or where any part of the cost or expense thereof is to be assessed upon private property, shall be made to said board, and such work or improvement, shall not be ordered or authorized until after said board shall have reported to the city council upon said application. But before any work or improvements as above contemplated shall be commenced, the city council, when recommended by the board of public works shall pass a resolution ordering that said work be done; provided that all applications for the purpose of changing the grade, or of making any improvements upon any street, avenue or alley, within the city shall be signed by at least three resident freeholders, owners of property abutting upon said street, avenue or alley; provided, however, that the city council may without petition or recommendation have power to order the improvement of any street, avenue or alley, or any part thereof by a two-third vote of all members of the city council.

"Sec. 136. Upon the adoption or passage of any resolution by the city council for the improvement of any street, avenue or alley, the board of public works shall cause a survey, diagram and estimate of the entire cost thereof, to be made by the city engineer; said diagram and estimate shall be filed in the office of the board of public works for the inspection of all parties interested therein. The clerk of said board shall forthwith cause a notice of such filing to be published daily for ten days in the official newspaper; such notice shall contain a copy of the said resolution passed by the city council, and must specify the street, highway, avenue or alley, or part thereof, proposed to be improved, and the kind of improvement proposed to be made, together with the estimated cost and expense thereof, and also a general description sufficient for identification of the property to be charged with the expenses of making such improvements, and that if sufficient remonstrance be not made

before the expiration of ten days after the date of the last publication, said improvement will be made at the expense of the owners of the lots and parcels of land described in said notice as hereinafter provided; but if within ten days after the final publication of said notice the persons owning one-half or more of the lots or parcels of land to be taxed for said improvements shall file with the clerk of the board of public works a remonstrance against said improvement, grade or alteration, the same shall not be made at the expense of the owners of the lots so described, unless the city council, by a two-thirds vote of all the members thereof, order said improvement made notwithstanding such remonstrance.

"Sec. 137. If no remonstrance be made and filed as provided in the last preceding section, then owners of the lots and parcels of land described in said notice shall be deemed to have consented to such improvement; or if such remonstrance has been made and filed, and the city council has ordered such work to be done or improvement to be made, the expense thereof shall be charged to the property described in said notice in the manner as hereinafter provided, and the board of public works, shall, at its earliest convenience, and within six months thereafter, establish the proposed grade or make the proposed improvement; provided, that no improvement shall be made when the estimated cost thereof shall exceed 50 per cent. of the assessed value of the property to be assessed.

"Sec. 138. Such cost and expenses of making said improvement shall be assessed upon the adjoining, contiguous or proximate lots or parcels of land described in said notice."

Without petition, the council passed this resolution, by unanimous vote: Resolved by the city council of the city of Tacoma, that said city council hereby declares its intention to improve N street, in Buckley's addition, from Steele street to Pine street, at the expense of the abutting owners. Grading and sidewalking. To be done by day labor." The board of public works, in due course, published a notice as follows: "Notice is hereby given that the following is a true copy of a resolution of intention passed by the city council February 27, 1892, to wit: Resolved, by the city council of the city of Tacoma, that said city council hereby declares its intention to improve N street, in Buckley's addition, from Steele street to Pine street, at the expense of the owners of the lots and parcels of land affected by said improvement, according to the city charter; said improvement to consist of grading to an established grade, and building sidewalks on both sides thereof. And the city engineer is hereby ordered to make a survey, diagram, and estimate of the said improvement, and file the same in the office of the board of public works.' That the survey, diagram, and estimate of the cost of said improvement were filed in the office of the board of public

works March 7, 1892, by the city engineer, and the estimated cost thereof is \$1,850."

The filing of a diagram and estimate consisted in the engineer's writing in an estimate book kept in the office of the board the following:

N Street in Buckley's Addition.

Steele to Prospect	cut	78	fill	1,055	curb	810
Prospect to White	"	530	"	157	"	270
White to Oak	"	1,453				
Oak to Race	"	575	"	46	"	29
Race to B'd'y	"	92	"	317	"	210
Totals		2,737		1,575		1,300
		2,136	lineal feet of	7	walk.	
		80	"	"	"	aprons.
		344	"	6	"	Xings.
		2,136	"	"	"	gutters.
		424	"	"	"	drain box.

1,800 feet frontage.

Estimate March 7, 1892, \$1,850.

No remonstrance of the owners of half or more of the lots to be assessed for the improvement was filed, and the board, without further order from the council, proceeded to make the improvement, completing it June 4, 1892, at a cost of \$1,885.94. August 6th, following, the council passed an ordinance (No. 688) entitled: "An ordinance providing for the improvement of N street from Steele street to Pine street, creating a fund, and providing for payment by assessment upon the adjoining, contiguous, and proximate lots or parcels of land, under the provisions of the city charter now in force,"—the body of this ordinance being as follows: "Be it ordained by the city of Tacoma: Section 1. That N street in the city of Tacoma be improved from Steele street to Pine street, according to the plans and specifications of the city engineer on file in the office of the board of public works. Sec. 2. That a fund be, and is hereby, created, and an assessment be levied and collected upon the adjoining, contiguous, or proximate lots and parcels of land, as provided by the city charter now in force, to defray the cost and expense of said improvement, according to the provisions of the city charter, which assessment shall be a lien upon the property liable therefor. Sec. 3. The board of public works is hereby authorized and directed forthwith to enter upon and complete said improvement by day labor, and to proceed in the premises as provided in the city charter. * * *." In these cases the appellants sought to enjoin the collection of the assessments levied upon lots owned by them, but the relief was refused.

Four things plainly appear from the record thus set out, viz.: (1) No resolution was passed ordering any improvement made on N street. (2) The engineer did not file a diagram in the office of the board. (3) Neither the board nor its clerk published a notice containing a copy of the resolution that was passed. (4) The notice contained no description of the property to be charged. But the respondents' position is that this does not matter, as something was done which was, in each particular, intended to comply with

the mandatory provisions of the charter. The question is, when did the city obtain jurisdiction to make this improvement and charge abutting property with the expense? Obviously, so far as these cases go, it was when such proceedings had been taken by the city as that the owners of the property to be charged had had the notice prescribed by the charter, and were bound to remonstrate or be estopped. To bring matters to such a point in a case where the proceeding is without petition, the council must have ordered the improvement, the engineer must have filed a diagram and estimate, and the clerk of the board must have published the notice.

1. The Resolution. The initiative step is the resolution which orders the improvement to be made. No such order can be intelligible which does not reasonably describe the kind of improvement intended, not, as counsel for respondents suggests would follow, with such particularity as would be necessary in the making of a contract for the work, but with such fullness of description as would enable an engineer who had no previous familiarity with the matter to make his diagram and estimate after survey of the street. Allowing that the verbless phrase used in the resolution before us means that it is the intention of the council to improve the street by grading it and constructing sidewalking, the query at once suggests itself, what is to be the extent of the grade, and what kind of sidewalk is proposed? There may or may not have been an established grade on N street, and, if there were such a grade, it may or may not have been the intention to conform to it in making this improvement. There is an infinite variety of sidewalks,—wood, iron, stone, brick, concrete,—of more forms than there are materials, some cheap and some expensive, but all sidewalks. How could the engineer make an estimate of the cost, or the board construct the work, without substantial directions in these particulars? The answer comes promptly with the suggestion: either they could not proceed at all, or they must proceed according to their own ideas. In this instance they took the latter course, but without any authority, since it lies with the council alone to prescribe the method of making all such improvements. Something is suggested in argument as to there being general ordinances of the city governing the improvement of streets, which served as a guide to the engineer and board of public works. There is nothing of this in the record, and, if there were such ordinances, they should have been referred to in the resolution in such a way as that parties interested would know where to look for a description of the kind of improvement intended. Streets are not, and usually cannot be, made after one pattern, like the interchangeable parts of a machine. One way of making an improvement may be substantially as good as another, and may serve the

purpose just as well, although the difference in cost may mean an easy payment by the owner in one case and substantial ruin in another. It is not to be supposed that the council would overlook such considerations, but that it would endeavor, while prosecuting a reasonable improvement, to lighten the burden of expense as much as possible in each particular case, without regard to any fixed, inflexible rule of procedure. To accomplish this it must know the circumstances surrounding the proposed work, and with this knowledge it can easily prescribe the general features of the improvement. To do otherwise is to cut off from property owners all knowledge of what they will be expected to answer for, and to deprive them of the opportunity to remonstrate in sufficient numbers if they see fit. But the worst of such a loose system is that it leaves to mere executive officers the exercise of a large discretion which the charter does not confer upon them. In other cases, which are also before us, the evil of such a system appears clearly exemplified. But perhaps the greatest defect of this resolution is that, while it declares the intention of the council to improve N street, it does not order anything, and furnishes no basis for any action on the part of the engineer and board of public works. Counsel for the respondents endeavor to excuse the method of procedure by resolution of intention by saying that the council had merely followed a habit acquired under the charter of 1886 (section 144). But under that charter the council itself controlled the work. The determination of the character of the work was equally necessary, and no such work could be done at all at the expense of the property except upon petition of the resident owners of more than one-half of it. But, be that as it may, the present charter had been in operation a year and a half when these proceedings commenced, and the "habit," under the old charter, cannot be accepted as an amendment to the new one. The resolution of intention should have defined the improvement intended, and directed the board of public works to proceed with its execution as defined, after notice, and upon the failure of property owners to present a sufficient remonstrance.

2. The Diagram and Estimate. The charter prescribes that a diagram and estimate shall be filed after a survey by the engineer. So far as the property owner is concerned with the estimate, the gross estimate of the cost and the total amount of frontage would seem to be about all he is interested in, since the charter method of payment is according to the front foot, and he can be charged for nothing in excess of the estimate. These two items, therefore, would enable him to calculate his probable expense. But the diagram, if it serves any purpose at all to the owner, must be intended to show him how the improvement, when completed, will probably af-

fect his property, so that he can intelligently determine whether he will remonstrate or not. It may be of the very highest importance to him to know whether he is to be left on the brink of a cliff or at the foot of a trestle; whether the assessment he will be called upon to pay will be his total expense, or whether this will be but the beginning of a large outlay necessary to protect his front or restore it to a safe, convenient, and decent condition. Perhaps, in the case of a new and uninhabited street, these would not be very important matters practically, but it is to be remembered that this charter prescribes a universal rule for all cases of street changes and improvements, and that the precedent laid down as a rule for a lot-booming street out in the woods makes the same rule that will be applied should the grade of the most important street in the city be raised or lowered. There was no attempt to comply with the charter in the matter of a diagram in this instance, and therefore one of the purposes of giving a notice was rendered futile.

3. The Notice. By the notice published the owners of property abutting upon N street from Steele to Pine were given to suppose that the council had passed a resolution which was never before that body. The framer of the notice appears to have been apprehensive that the resolution as passed was defective in some particulars, and therefore he changed it, and added to it matter enough to more than double its actual length. The publication of a copy of the resolution in the notice is intended to bring home to the property owner information that the council has acted in a matter of interest to him, and to let him know precisely what it has done and proposes to do. This copy to be published means a literal copy, according to the usual way in which the word is used, and not the construction which the clerk of the board of public works may put upon the meaning of the resolution. However, in justice to the clerk in this instance, it ought, perhaps, to be said that he had nothing whatever to do with the publication, which was made by the individual members of the board, thus adding one more item to the list of charter infractions. The notice is by the charter required to specify the kind of improvement proposed to be made, and to contain a general description sufficient for identification of the property to be charged. The first of these requirements would be met by the copy of the resolution if that document contained any sufficient specification; the second gives rise to further consideration. The resolution in this case declares the intention to be to improve "at the expense of the abutting owners." The notice improves upon the original by the phrase, "at the expense of the owners of the lots and parcels of land affected by said improvement, according to the city charter." Neither is a correct statement, critically considered, for the expense is not charged upon the owners, but is assessed to land without regard to ownership. But this

is a matter of small consequence. The respondents' reply is that section 138 of the charter makes it obligatory upon the city to levy the assessment in a certain way, each lineal foot of frontage along the line of the improvement paying its proportion of the total cost; so that every person owning property along a street, knowing the law, must know that, when that street is to be improved, his property will necessarily be included in the assessment. The argument is well enough as far as it goes. But what is it worth in the face of the charter direction? According to this theory, when the charter required the notice to specify the street, or part thereof, proposed to be improved, it should have stopped, because the owner could well enough reason out the necessary conclusion as to the liability of his property. It went on, however, and specifically required the property to be charged to be described in a way sufficient for identification; and, more than this, the very first clause of section 138 is in these words: "Such cost and expenses of making said improvement shall be assessed upon the adjoining, contiguous or proximate lots or parcels of land described in said notice, in the following manner;" thus emphasizing what seems to us to have been the clear intention, viz. that each owner should have laid under his eyes specific information that his property was to be assessed, without any resort on his part to argument or conclusion. And this case furnishes an excellent illustration of the value of such a requirement, for where lots lie endwise to a street they are to be assessed their full share of the cost according to frontage, but where they lie lengthwise half of the cost is to be assessed to the first lot, and the other half to other lots in the rear to the center of the block. Now, it happens that N street runs through blocks in all of which the lots lie lengthwise along it, and there are sixteen lots in each tier, so that one lot must pay half the expense assessed on a hundred feet frontage, and seven lots pay the other half. Could the holder of a deed to lot 27 in block 7, which is the sixth lot from the street, without a familiarity with the lot and block system of Buckley's addition, which is not to be presumed, know whether his lot would be within the assessment district, unless he hunted up a plat? Had he not, under the express language of the charter, a right to expect to see, in a notice of the improvement of N street, his lot specifically named, or at least "lots 25 to 32, inclusive, in block 7," which would have been a sufficient description in this instance, even for a deed? If he did not, then of what use is the minute particularity of this charter in the matter of street improvements? If the city's officials can override these plain, mandatory provisions in the many particulars already pointed out, and improve streets ad libitum, and the property owner be bound on theories of substantial compliance, estoppel, waiver, benefits, or failure to tender fair value, we fail to see any

sensible reason for such provisions in a charter. But the people who pay for streets made the charter, and, while they granted to the public authorities most liberal powers, by permitting the arbitrary improvement of streets at local expense, they emphatically reserved to themselves the right to have three things distinctly brought to their knowledge, viz.: (1) What improvement it is proposed to make; (2) what the cost is to be; (3) what property is to be charged with the expense. This knowledge they declared must be afforded in a certain way, and after that they reserved the right to remonstrate, and to have a two-thirds vote of the council to overcome their objections. It is unnecessary to cite authorities on these points. The A, B, C of the laws of municipal corporations, that the power to levy special assessments is to be construed strictly, that the mode prescribed is the measure of power, and that material requirements must be complied with before there is any liability, is all that need be quoted. *Spokane Falls v. Browne*, 3 Wash. St. 84, 27 Pac. 1077. An assessment made contrary to these principles is void, and injunction lies to restrain its collection. *Dill. Mun. Corp.* §§ 803, 804; *Hill, Inj.* § 539.

4. It only remains to determine whether Ordinance No. 688 had any effect to validate the assessment. That it did not must be apparent at a glance. The work had been done beyond recall, and no remonstrance of property owners could have any possible effect. That it gravely ordered the board of public works to proceed with an improvement which had been completed two months before only made its weakness the more apparent. Why it should have been passed, unless through a consciousness on the part of the council that what had been done in the matter was wholly without force to render an assessment valid, it is hard to guess. "Before any work or improvement * * * shall be commenced, the city council * * * shall pass a resolution ordering said work to be done," is the lan-

guage of the charter, and, if anything, its most mandatory provision. That any such proceeding is unavailing as a ratification, see *Newman v. City of Emporia*, 32 Kan. 456, 4 Pac. 815.

We regret to disagree with the learned judge who passed upon these cases in the superior court, and who prepared a careful and extended opinion, which has been presented to us by counsel. But, either the point was not pressed, or the opinion fails to observe, that the objections raised by the appellants go to the jurisdiction of the city to make the improvement at all at the expense of abutting property, by reason of a complete failure to carry out the plain provisions of the charter, which were conditions precedent to the exercise of the power. Under these circumstances there is no greater legal or equitable right in the city to be reimbursed its outlay than there is in a trespasser upon land who makes valuable improvements and is dispossessed by an ejectment suit. It has done what it did in its own wrong, without previously qualifying itself to have reimbursement; and to now declare that, because the law upholds local assessments on the theory of benefits, a city which omits the steps necessary to bring it under the operation of that law shall have the same right to enforce its assessments as one which takes those steps, would be to deprive the property owner of that which the charter in distinct terms gives him, viz. a right to be heard upon the question of the advisability of the improvement before it is undertaken. There may be cases in which such circumstances exist as should estop an owner from objecting to an assessment in any event, but we do not find them in these cases. The judgments are reversed, and the causes remanded for the entry of judgments in accordance with the prayer of the complaints.

DUNBAR, C. J., and ANDERS and SCOTT, JJ., concur.

CITY OF ATLANTA v. GABBETT.

(20 S. E. 306, 93 Ga. 266.)

Supreme Court of Georgia. Nov. 6, 1893.

Error from superior court, Fulton county; Marshall J. Clarke, Judge.

Petition by Sarah E. Gabbett against the city of Atlanta to restrain the collection of executions issued to enforce the payment of assessments for sewer construction. From a judgment entered on a verdict for plaintiff, and from an order denying a new trial, defendant brings error. Affirmed.

The following is the official report:

Mrs. Gabbett, by her equitable petition, sought to enjoin the city of Atlanta from collecting two executions,—one issued to enforce an assessment against her property on account of the construction of what is known as the "Butler Street Branch Sewer" through her property in Atlanta, and the other issued to collect a similar assessment on account of the construction of what is known as the "Rice Street Sewer" through her property. The jury, under the direction of the court, made a verdict in favor of enjoining altogether the collection of the first execution mentioned, and of enjoining the collection of one-half the assessment remaining after the deduction of certain admitted overcharges on account of the construction of the Rice street sewer. The motion for new trial made by defendant was overruled, and it excepted. The motion contained the grounds that the verdict was contrary to law, evidence, etc. Also, because the court erred in admitting in evidence, over defendant's objection, the testimony of G. W. Adair, to the effect that only a small part of the area of the plaintiff's property was susceptible to direct drainage by the sewers constructed by defendant through plaintiff's property, and for the construction of which the executions in question were issued. Defendant's objection was that the rate and method of the assessments against the property of plaintiff for the building of the sewers were fixed by the act of November 8, 1889, amending the charter of Atlanta, and that it was not competent for plaintiff, under the pleadings, to have the question of the reasonableness or unreasonableness of these statutory assessments submitted to the jury on the testimony of witnesses. It appears from the petition of plaintiff that the question of the reasonableness of these assessments is raised by her petition, it being alleged by her, in the petition, that the sewers are not in any sense such as can be used by her for draining off the water that falls upon her property, or for the connection of private sewers from her property; that for the construction of one of the sewers an assessment has been made against her property for 429 feet, whereas a portion of it does not pass through her property at all, leaving her property entirely, and re-entering it again, but nevertheless all charged to her from where it first enters, to

where it last leaves, her property; and that there is as much incidental benefit, if any at all, to adjoining property, as to her property, the sewer being constructed just a little on her side of the line, etc. The testimony was also objected to on the ground that, if the reasonableness of the assessments could be inquired into by the jury at all, it was only competent for plaintiff to prove the facts as to the location and description of the property, the location and character of the sewers, the capacity of the property for subdivision and improvements and the like, and leave the jury to draw their own conclusions as to the feasibility of draining the area of plaintiff's lot by means of these sewers. Defendant alleges that the court erred in overruling these objections, and admitting the testimony of this witness and the witnesses Williams and Smith to the same effect, and also that of the witness Wilson as to the size and cost of lateral sewers which would be necessary, in the opinion of the witness, to drain certain parts of the plaintiff's property. Error in rejecting testimony offered by defendant, tending to show that the strip of ground belonging to plaintiff lying on the north side of Rice street sewer, while too narrow or shallow to be cut into building lots, had been greatly enhanced in value by reason of the construction of the sewer, on account of its lying immediately between other vacant property fronting on the south side of Pine street and the line of said sewer; defendant offering to prove that the strip of ground in question was worth more to the owners of this adjoining vacant property than before the construction of the sewer, and because of such sewer construction. Error in instructing the jury to return a verdict enjoining defendant from further prosecuting the execution for \$1,179 on account of the construction of the sewer known as the "Butler Street Branch Sewer." This instruction was based on an alleged insufficiency in the description of the size of the sewer in the notice published after the introduction of the ordinance under which the sewer was built, and before the passage of the ordinance. In this notice it was stated that the sewer was to be of "various diameters." It was agreed on the trial that both this notice and the other attached to defendant's answer, marked "Exhibit A," were regularly published as required by law, and this ruling of the court was based solely on the absence of a more specific statement of the size of the sewer in the notice first mentioned,—Exhibit B. It appears from defendant's answer that an ordinance for the construction of this sewer was introduced, and the notice Exhibit A was given, in which it was stated that the sewer was to be from seven feet nine inches to nine feet in diameter, of brick and stone, etc., but for want of accessible funds the construction of this sewer could not be provided for under said ordinance; but afterwards another ordinance for the construc-

tion of the same was introduced, and the notice Exhibit B was given. Defendant alleges that the instruction was erroneous, for the following reasons: (1) So much of the act of 1889 as prescribes that notice shall be published after the introduction of the ordinance, and before its passage, is directory merely, so that the notice published before the introduction of the ordinance (that in Exhibit A) was sufficient. (2) The question of compensation for the right of way of the sewer not being in issue in this case, and the amount of the assessment being fixed by statute at 90 cents per front foot on each side of the sewer constructed through plaintiff's land, and the amount of said assessment being stated in the notice in question; and it being admitted by counsel for plaintiff that the sewer was of suitable size and character for the proper drainage of this property and the section of the city it was constructed to drain; and it being in evidence, plaintiff being a nonresident, that her resident agent never read either of the advertisements, but had actual notice of the facts that the sewer was to be constructed and was being constructed, and of its size and general character; and it being admitted that the sewer cost more than \$10 per lineal foot to build, and the evidence being uncontradicted that the construction of the sewer had enhanced the market value of plaintiff's property in a greater sum than the amount of the assessments against the property on account of the construction of the sewer; and it being also shown that the notice Exhibit A, which had contained a statement of the size of the sewer, was published in October, 1890; and the act of 1889 providing that a substantial compliance with the requirement as to notice should be sufficient,—the court should have held that the omission of the specific statement of the size of the sewer in the notice Exhibit B was immaterial, or should have submitted to the jury, as requested by defendant, the question of whether the notice given by both advertisements, in the light of all the facts and circumstances, amounted

to substantial compliance with the act of 1889. Error in directing a verdict for plaintiff as to the execution for \$1,179, for the further reason that actual notice to plaintiff's agent, as shown by his testimony, dispensed with the necessity for constructive notice to plaintiff by publication, or at least such actual notice aided the published notice to such an extent as to make the omission of a specific statement of the size of the sewer in the last published notice harmless to plaintiff, and immaterial. The agent in question testified that he was only plaintiff's agent for paying tax on the property; that he was her agent when this sewer was built; that he knew it was going to be built, and when it was being built, and took no steps to try and stop it; that he corresponded very little with plaintiff about the property, except about paying taxes, etc.; and that he saw neither of the notices, and made no objection to the construction of the sewer. Error in submitting to the jury the question of the reasonableness of the assessments against plaintiff's property on account of the construction of the Rice street sewer, there being no question of the sufficiency of the notice published as to that sewer. The effect of the instruction as to this assessment, defendant alleges, was to altogether disregard the rate and basis of assessments fixed by the act of 1889, under which the sewer was constructed, and leaves the jury free to adopt a different basis for allowing or disallowing the assessments made against plaintiff's property than that made by that statute. Defendant says the instruction was erroneous because the assessments were valid in law, and ought to have been upheld by the court, and not submitted to the jury at all, or, if at all, then only in so far as to ascertain from the evidence that they were made in conformity to the act and the city ordinance.

J. A. Anderson and Fulton Colville, for plaintiff in error. Hall & Hammond, for defendant in error.

PER CURIAM. Judgment affirmed.

STATE (RAYMOND'S ESTATE et al., Prosecutors) v. MAYOR, ETC., OF BOROUGH OF RUTHERFORD.

(27 Atl. 172, 55 N. J. Law, 441.)

Supreme Court of New Jersey. June 8, 1893.

Certiorari by the state, at the prosecution of the estate of Aaron Raymond and others, against the mayor and common council of the borough of Rutherford, to review the final assessment of grading Union avenue from Erie avenue to the Passaic river, in the borough of Rutherford. Assessment sustained.

Argued February term, 1893, before DE-PUE and LIPPINCOTT, JJ.

Addison Ely, for prosecutors. Copeland & Luce, for defendants.

LIPPINCOTT, J. This certiorari brings up for review the final assessment for grading Union avenue from Erie avenue to the Passaic river, in the borough of Rutherford. The whole length of the improvements was 13,409.96 feet. There are two plots assessed to the prosecutors. The plot on the northwesterly side of the avenue has a frontage thereon of 2,065.06 feet, and is designated as "Plot No. 47" on the assessment map, and is assessed for the sum of \$1,497.16. The plot on the southeasterly side of the avenue has a frontage thereon of 2,062.50 feet, and is designated as "Plot No. 51" on the assessment map, and is assessed for the sum of \$1,495.31. The total cost and expense of the improvement amounted to the sum of \$9,706.43. The whole of the amount, with the exception of \$183.44, was assessed, as benefits received, upon the owners of lands claimed to have been benefited. This sum of \$183.44 was by the commissioners of assessments adjudged to be an excess of benefits, and was placed upon the borough at large. The reasons for setting aside the assessment will be taken up in the order in which they were discussed in the argument.

The sixth reason or objection is that the commissioners making the assessment are taxpayers in the borough, and therefore are not disinterested. The objection is not well founded. By the fifth section of the act entitled "A further supplement to an act entitled 'An act for the formation of borough governments approved April 5, 1878,'" which further supplement was approved April 1, 1887, (Laws 1887, p. 126,) it is provided "that the mayor and council shall appoint, three disinterested freeholders of said borough, residing in different wards, if the borough be divided into wards, commissioners to make the assessment of the costs and expenses of such improvement or work done in the manner herein contemplated." It is not contended that this provision of the statute was not followed in the appointment of these commissioners. This statute was approved in the case of State v. Mayor, etc.,

of Rutherford, at the June term, 1890, of this court. A memorandum of that decision is filed. 19 Atl. Rep. 972.

The seventh objection is that the commissioners admitted that they favored making every street pay for its own improvements,—that is, pay for itself, without regard to benefits,—and that, therefore, they are not disinterested commissioners. It appears from the evidence of Mr. Ely, a witness in the case, that after the making and filing of the report of assessments, and upon the hearing of objections, at the time appointed for such hearing, in the discussion which ensued, the chairman of the commissioners said to him that it was the policy of the borough to assess the cost of the improvement of the streets upon the streets so improved, and they calculated to make each street pay for its own improvement, and that at this time there was no dissent expressed by the other commissioners. It does not appear that their attention was again called to the matter, in connection with this street improvement, or that it was anything more than a casual remark, and it is not such an expression as would warrant a legal conclusion that the commissioners were not disinterested. It might well be found, upon examination of all the circumstances, that the policy of making each street in the borough of Rutherford pay for its own improvement might not be discordant to the application, practically, of the principle that for such improvements lands should be assessed only in proportion to benefits received. Union avenue was an old street or road, and a thoroughfare between Newark and Passaic, with the exception of that part which crosses the lands of the prosecutors. This old road or old street extends, as will be seen by referring to the map, from what is known as "Erie Avenue," running along the Erie Railroad to Riverside avenue. It connects with the Newark and Haekensack road, on the east of the borough, and with the river road, which leads from Newark to Passaic. It is one of the two thoroughfares in the borough of Rutherford. It is the principal road between Rutherford and Passaic. The river road is what is now marked on the assessment map as "Riverside Avenue." It is about 2,000 to 2,100 feet from the point where Riverside avenue intersects Union avenue to the river. The lands of the prosecutors lie west of Riverside avenue, and extend, as shown on the map of this section of country, from the Erie Railroad, on the north, to about a mile to the south. These lands are bounded on the west by the river, and the tract of their land through which Union avenue, as now graded, extends, contains about 150 acres. Union avenue, before it was graded, did not extend through these lands, but ended at Riverside avenue. Before Union avenue was graded there existed no street through their lands. There was, as shown by the evidence, a sort of a passable road or drive

way through the lands of the prosecutors from Riverside avenue to the river, a little to the north of the middle of their property. When it was contemplated to grade Union avenue, the prosecutors dedicated to the borough of Rutherford the land needed for its extension from Riverside avenue, sometimes called "River Road," to the river, a dedication practically coinciding with the old driveway already there. The commissioners' map of the improvement through the lands of the prosecutors shows a number of cross streets intersecting Union avenue. These appear to have been made in accordance with a plan of development of this property by the prosecutors. None of these cross streets are yet public streets, by dedication or otherwise. It is shown that the prosecutors had done some filling and grading in reference to the lines of these streets. There can be but little question that this improvement renders the lands of the plaintiffs much more available for the only purpose for which they hold them. Before this improvement these lands were almost entirely without any outlet, and unavailable. It is apparent from the evidence that the whole of this large tract of land was held by the prosecutors with the expectation of bringing it into market. The feasibility of the erection of a bridge over the Passaic river at the end of Union avenue, as now graded, has been much discussed by them. The situation of the lands, as shown, in connection with their communication with the borough of Rutherford and other places, indicates at once that this improvement is one very desirable to the lands of the prosecutors. The prosecutors themselves dedicated the lands for this improvement by deeds of dedication formally executed and delivered to the borough, and also, with others, formally petitioned for this improvement, and, as is shown by the evidence, expected to be quite heavily assessed for its benefits.

I notice that, in the argument and brief of counsel for the prosecutors, it is contended that the assessment includes various items of expenses not properly chargeable to the landowners assessed. It appears that no objection was taken on this ground, although the prosecutors appeared before the mayor and council before the report was confirmed. Upon the argument, objections were urged to certain items, amounting in all to \$185.19. This expense of \$185.19 consists of four items in the statement of costs:

(1) March 16. Payment to W. N. Jacobus, temporary walks.....	\$ 69 00
(2) November 16. Payment to McKinney for relaying drain.....	21 00
(3) December 21. Legal expenses in making searches and procuring releases	75 00
(4) January 18. Paid Galloway for curbing and guttering.....	20 19
Total	\$185 19

The making of the drains, walks, and curbing and guttering was entirely neces-

sary to the proper grading, as shown by the evidence on pages 93, 94, and 96 of the testimony. The item of legal expenses was for services in relation to the dedication of that portion of Union avenue extending through the prosecutors' lands. These expenses were incident to the work of grading the street. *Vanderbeck v. Jersey City*, 29 N. J. Law, 448; *Hand v. City of Elizabeth*, 30 N. J. Law, 365; *Id.*, 31 N. J. Law, 551; *Davis v. City of Newark*, 54 N. J. Law, 144, 23 Atl. Rep. 276. I think these items are properly included in the costs and expenses of the grading. It is to be noticed that there is no reason filed, covering this objection.

The second reason is that the commissioners, in making the assessment, have not included therein all the lands benefited by the improvement. The commissioners, under their oaths, certify that no other lands, except those assessed, were benefited; and their judgment, so far as the general area over which the assessment extends, remains unassailed by any evidence in the case. The commissioners determined that no other lands than those fronting on Union avenue were benefited. I think this judgment is not contradicted by the evidence on the part of the prosecutors, and, so far as the evidence on the part of the defendants is concerned, their judgment is fully confirmed. The testimony of the commissioners upon this point is fully sustained by the evidence of those witnesses whose judgment in this matter can be regarded. There were only four particular plots to which the prosecutors raised any question in respect to this reason. One was a strip of about five feet wide, supposed to belong to Mr. Jackson. It is very difficult to determine whether this is included in the assessment or not. When he received his assessment bill for benefits to his plot of land, he discovered he had been assessed for 67 feet, instead of 72 feet, and under the evidence I cannot ascertain that he owns any more than 67 feet. There were three small plots in the rear of plots 60, 72, and 76, which the prosecutors assert should have been assessed, on the ground that all lands to the depth of 150 feet should have been assessed. I see no reason why the judgment of the commissioners should be disturbed in this matter. The evidence is quite convincing that these plots were not benefited. There is some evidence of benefits received by them. The conclusion reached is that they were not benefited, but, if so, the utmost assessment which could be laid upon all these plots of land, according to the evidence, would not exceed the sum of \$75. The judgment of the commissioners must stand. There is no convincing evidence against it. *Hegeman v. City of Passaic*, 51 N. J. Law, 113, 16 Atl. Rep. 62; *Burlington v. Atlantic*, 49 N. J. Law, 408, 8 Atl. Rep. 111. Assuming these parcels should have been assessed, \$75 would have been the utmost assessment for the whole four of them, and the assessment

against the borough at large was greater than this, and therefore no injury has arisen to the prosecutors by this omission. *Righter v. City of Newark*, 45 N. J. Law, 109; *Davis v. City of Newark*, 54 N. J. Law, 144, 23 Atl. Rep. 276.

In the third reason the objection urged is that the commissioners have not defined the extent of the lands of the prosecutors and other landowners fronting on said avenue, upon which the assessment is made a lien. Now, whether the lands of the prosecutors have been benefited or not, or whether assessed in excess of benefits, is a question to be discussed by itself, and so can the question whether the frontage assessment is upon correct principles or not, but the evidence and the report of the commissioners here answer fully this objection. The plots of the prosecutors' lands are laid down upon the assessment map, and referred to in the report of the commissioners by plot numbers, as laid down on the map, and they show the frontage of each lot on either side of Union avenue. The map is scaled, and the dimensions of the plots assessed are determined and marked exactly the same as the plots of other landowners fronting the improvement. The contention of the prosecutors is that the assessment, even if correctly laid as to its distribution on the frontage, is a lien upon large tracts of lands of the prosecutors, some parts of which may not be benefited, while the front, to some certain depth, might be benefited by assessment imposed. This situation, if correct, would not call for a reversal of the assessment, but only for some action directing the commissioners to properly apportion the assessments; and it may be, in this case, that this would be a very proper proceeding, but the assessment of benefits to the prosecutors will not be set aside for this reason.

The fifth reason urged for nullifying this assessment against the prosecutors is that the whole assessment, including that made upon the lands of the prosecutors, is made upon the frontage of lands fronting on said avenue, without regard to the size, value, or depth of the lots assessed. This contention is not sustained by the evidence. The report of the commissioners is "that we, and each of us, have personally and thoroughly examined the said Union avenue and adjacent property, and lands specially benefited by said grading; that we have justly, fairly, and equitably assessed the aforesaid cost and expense upon the lands and real estate specially benefited by such improvement to the extent and not beyond such benefit; and that in making such assessment we have, in each and every case, had due regard and consideration to the benefits received by such lot and parcel of land from such improvement, over and above all damages sustained by each of said lots or parcels of land, and that in no case have we assessed any lot or parcel of land more than the amount of such benefit."

This is the standard of assessment provided for by the borough laws governing this subject-matter. Laws 1887, p. 126, § 4. I find no evidence assailing the area of the assessment, whatever may be said of the benefits accruing within it. The judgment of the commissioners was that the special benefits in this case were clearly limited to the frontage. It will be found that the rate of the various assessments is not always the same. In most instances it will be found that the conditions were merely identical, and there was but little reason for any difference. But the judgment of the commissioners is that the benefits laid by them were special benefits, laid according to benefits bestowed, and not in excess thereof. There is no evidence that in laying the benefits, so far as there were benefits, upon the frontage, the commissioners did not conform to the principle of peculiar benefits. The principle of frontage assessment is not necessarily wrong. If that mode properly distributes the benefits among the owners of property benefited, there can be no objection to its use. *Jersey City v. Howeth*, 30 N. J. Law, 529; *Pudney v. Village of Passaic*, 37 N. J. Law, 65. The commissioners assessed all the lands which, in their judgment, were benefited. This judgment has not been successfully assailed by the evidence or facts of the case. *Hunt v. Mayor, etc., of Rahway*, 39 N. J. Law, 646.

The last reason to be discussed—the first among the reasons of the prosecutors—as an objection to this assessment is that "the said assessment upon the lands of the prosecutors for the said improvement is largely in excess of all benefits the said lands will derive from said improvement," and this includes a consideration of the contention of the prosecutors that a very large portion of this cost and expense should have been borne by the borough at large. These questions were discussed at length by counsel, and reviewed very voluminously in their briefs. It cannot be expected that all the evidence, and contentions arising out of it, can be taken up and discussed. The report of the commissioners is before us, and the rule of law is clear that upon these points their judgment cannot be interfered with, unless the force of the circumstances and evidence convinces us that it is wrong, and that an injustice has been done. The rule is well established that the assessments for benefits for street improvements, where the commissioners have been over the ground, and examined the premises, and made their report of estimates according to the principles prescribed in the charter, will not be set aside upon conflicting evidence of the justice or sufficiency of said assessment. It must clearly appear that injustice has been done before an assessment will be set aside upon all the facts. This is the rule, notwithstanding the statute which authorizes the court to determine disputed questions of fact as well as law. *Jelliff v. Newark*, 48 N. J. Law, 101, 2 Atl. Rep. 627; *Hegeman v. City*

of Passaic, 51 N. J. Law, 113, 16 Atl. Rep. 62. It will be remembered that the prosecutors were urgent applicants for this improvement, and that this improvement affords access to the populous part of Rutherford and other places from their lands along the river, and renders the lands of the prosecutors available for almost any use,—that of residence, or other uses; that this improvement is an outlet to other places besides Rutherford. It opens a large tract of land for use; opens it to the main portion of Rutherford, and their river front is made available. The improvements run nearly through the middle of a large tract belonging to the prosecutors, and, according to their own plans, open it up to development. The question of benefits and damages to their lands has been extensively discussed, and many witnesses have been called on both sides. It appears in evidence that the prose-

cutors, before the improvement was commenced, and at a time when they had joined with others in applying for it, were willing to be assessed quite heavily for it. Some of the witnesses think that a portion of the expenses should have been a burden upon the borough. Some fix a small proportion. Others fix a large proportion. Others contend that it should all be borne by the land benefited. The conclusion, from an examination of the evidence in connection with the report of the commissioners, is that the great weight of the evidence is in support of the assessment as made. A discussion of this evidence in detail appears to be useless. The fact that the evidence is conflicting as to benefits does not suffice to disturb the assessment. *Jelliff v. Newark*, 48 N. J. Law, 101, 2 Atl. Rep. 627; *Hegeman v. City of Passaic*, 51 N. J. Law, 113, 16 Atl. Rep. 62. The assessment must be sustained.

CAIN v. CITY OF OMAHA.

(60 N. W. 368, 42 Neb. 120.)

Supreme Court of Nebraska. Oct. 2, 1894.

Error to district court, Douglas county; Hopewell, Judge.

Action by Orin R. Cain against the city of Omaha to recover an amount paid for a tax alleged to be invalid. Judgment was rendered for defendant, and plaintiff brings error. Reversed.

B. G. Burbank, for plaintiff in error. W. J. Connell, for defendant in error.

IRVINE, C. The plaintiff was the owner of a strip of land about 900 feet long, and 189 $\frac{3}{4}$ feet deep, fronting on Locust street, in the city of Omaha, designated as "tax lot 57." For the purpose of opening Twenty-Second street from some point south to Locust street, the city appropriated a strip of land 66 feet wide across the land of the plaintiff. The result of opening this street was to leave tax lot 57 in two tracts,—one extending east from Twenty-Second street, so extended, 314 feet; the other extending west from Twenty-Second street 507 feet. The plaintiff was awarded \$3,010 for the strip of land so taken. In order to pay this award, a local assessment was levied on lot 57 and other property. The plaintiff paid that portion of the assessment levied on lot 57 under protest, having objected to the levy before the board of equalization, and then brought his action, under Comp. St. 1889, c. 12a, § 69, to recover back the taxes so paid as being invalid, unjust, and inequitable. It was alleged that the amount assessed upon tax lot 57 was exorbitant, unjust, and illegal, and in excess of the special benefits conferred, and that property south of said tax lot was not assessed at all, although equally benefited. These allegations were put in issue. There was a trial to the court, and a finding and judgment for the defendant, from which the plaintiff prosecutes error, assigning practically only that the finding and judgment are not sustained by the evidence. The city rested its case upon the plaintiff's evidence, and there is no conflict whatever in the proof. The city has not furnished us with a brief, and we are not informed upon what grounds the learned district judge determined the case,—perhaps from a doubt of the authority of the court to review the assessment in such a proceeding. The uncontradicted evidence shows that the whole amount awarded for the appropriation of property was to the plaintiff for the strip of land referred to. Of the \$3,010 so awarded, \$1,000 was levied upon that portion of lot 57 lying east of Twenty-Second street, \$1,000 on that portion lying west of Twenty-Second street, and the remainder in small amounts on land lying on either side of Twenty-Second street north of Locust, ex-

tending back from Twenty-Second street 184 feet, and north from Locust street six blocks. The fact that two-thirds of this tax was levied upon the remainder of the tract a part of which was appropriated, and the other one-third distributed in very small sums over a vast area, is in itself sufficient to excite grave suspicions as to the bona fides of the proceedings. Cain had subdivided lot 57 into 18 lots, upon which he constructed houses. The evidence is uncontradicted that no portion of lot 57 received any benefit from the opening of Twenty-Second street except the two lots which were thereby given a frontage upon that street,—in other words, made corner lots by the improvement,—and that the benefit to those lots did not exceed \$150 each. It is elementary constitutional law that the only foundation for a local assessment lies in the special benefits conferred by the improvement, and that a local assessment beyond the special benefits conferred is a taking of private property for public use without compensation. *Hanscom v. City of Omaha*, 11 Neb. 37, 7 N. W. 739. This tax exceeds the special benefits conferred by at least \$1,700, and to that extent was clearly illegal. Further, the tax was levied on the whole of lot 57, extending west from Twenty-Second street 507 feet, and east therefrom 314 feet. Among the subdivided lots to the north, the assessment did not extend beyond a depth of 184 feet. Section 73 of the law relating to cities of the metropolitan class provides that, when "any public improvement shall extend into or through any unsubdivided tract, parcel or parcels of land, said taxes shall be levied so as not to be charged against the real estate adjoining such improvement for a greater depth than the average distance through the subdivided real estate to be taxed for said purpose." Under this statute, no portion of lot 57 lying more than 184 feet from Twenty-Second street could be taxed.

The evidence clearly shows that the assessment was made in an illegal manner, and that it was grossly unjust. In fact, the whole scheme of assessment is such as to indicate that an attempt was made, under the guise of a local assessment, to take back from the plaintiff two-thirds of the condemnation money awarded him. It is but just that, where a portion of one's property is taken under circumstances allowing no deduction for benefits conferred upon the remainder, the remainder, if especially benefited, should bear its fair proportion of the cost of the improvement. But the courts will not permit municipalities to evade the provision of the constitution that the property of no person shall be taken or damaged for public use without just compensation by paying the compensation, and then, under the guise of taxation, taking it back from the person entitled. Reversed and remanded.

✓ LOVE v. CITY OF RALEIGH.

(21 S. E. 503, 116 N. C. 296.)

Supreme Court of North Carolina. April 16, 1895.

Appeal from superior court, Wake county; Bynum, Judge.

Action by E. H. Love against the city of Raleigh for injuries received through the negligence of defendant's agents in managing a pyrotechnic display. There was a judgment for defendant, and plaintiff appeals. Affirmed.

Battle & Mordecai, for appellant. J. N. Holding and Strong & Strong, for appellee.

AVERY, J. The principal questions presented by this appeal are: First, whether the city of Raleigh was empowered by any general or special statute to purchase fireworks, and order a committee to direct the manner of making the display; second, whether, if no such authority had been delegated to the municipality, it would be answerable for the wrongful conduct of agents acting within the scope of its instruction to them, but in the exercise of authority not delegated to it by the legislature. It will possibly aid us in the elucidation of these questions to lay down some general fundamental rules defining and fixing the limits of municipal powers. So long as a city keeps within the purview of its delegated authority, it is not responsible for any act of its agents, done in the exercise of its judicial, discretionary, or legislative powers, except where subjected to such liability by some express provision of the constitution or of a statute. *Moffitt v. Asheville*, 103 N. C. 255, 9 S. E. 695; *Hill v. City of Charlotte*, 72 N. C. 56; 1 *Shear. & R. Neg.* § 262; *Robinson v. Greenville*, 42 Ohio St. 625. But when such a corporation is acting in its ministerial capacity, or its corporate, as distinguished from its governmental, character, in the exercise of powers conferred for its own benefit, and assumed voluntarily, it is answerable for the torts of its authorized agent, subject to the limitation that such wrongful acts must not only be within the scope of the agency, but also within the limits of the municipal authority. *Moffitt v. Asheville*, 103 N. C. 254, 9 S. E. 695; 2 *Dill. Mun. Corp.* (4th Ed.) § 968 (766). In the section cited above, Judge Dillon says: "If the act complained of necessarily lies wholly outside of the general or special powers of the corporation, as conferred by its charter or by statute, the corporation can in no event be liable to an action for damages, whether it directly commanded the performance of the act, or whether it be done by officers without its express command; for a corporation cannot, of course, be impliedly liable to a greater extent than it could make itself by express corporate vote or action." Referring especially to the wrongful acts of agents of municipalities, the same author says in a subsequent section (969a): "As to

torts or wrongful acts not resting upon contract, but which are ultra vires in the sense above explained (viz. wholly and necessarily beyond the possible scope of the chartered powers of the municipality), we do not see on what principle they can create an implied liability on the part of the municipality. If they may, of what use are the limitations of the chartered corporate powers?" 2 *Thomp. Neg.* 737; *Smith v. City of Rochester*, 76 N. Y. 506; *Mayor, etc. v. Cunliff*, 2 N. Y. 165. It is not denied that if the agent, in the course of his employment, is guilty of negligence, or commits even a willful trespass, with the belief and intention that the act will inure to the benefit of the principal, then not only does the doctrine of respondeat superior apply, but both principal and servant may be made to answer for the resulting damage. See authorities cited in *Tate v. City of Greensboro*, 114 N. C., on pages 416, 417, 19 S. E. 767; especially 2 *Dill. Mun. Corp.* §§ 979, 980, et seq.; *Hewitt v. Swift*, 3 *Allen*, 420; *Johnson v. Barber*, 5 *Gilman*, 425; *Wright v. Wilcox*, 19 *Wend.* 343. "Without express power," says Judge Dillon, 1 *Mun. Corp.* § 149 (100) "a public corporation cannot make a contract to provide for celebrating the Fourth of July, or to provide an entertainment for its citizens or guests. Such contracts are void, and, although the plaintiff complies therewith on his part, he cannot recover of the corporation." *Hodges v. Buffalo*, 2 *Denio*, 110; 2 *Dill. Mun. Corp.* § 916 et seq.; *Austin v. Coggeshall*, 12 *R. I.* 329. It is needless to cite further authority in support of the proposition that if a city is not empowered to contract a debt for the purpose of making a display on a national holiday, or on such an occasion as the centennial anniversary of its existence as a municipality, it would follow of necessity that it could not, by empowering agents to supervise a display that it could not lawfully pay for, subject its taxpayers to liability for the willful wrong or negligence of such agents, when they are acting entirely outside of the scope of any duty that the city is authorized to impose. 2 *Dill. Mun. Corp.* § 969a. A municipality is not answerable for torts of a servant, except where the wrong complained of is an act done in the course of his lawful employment, or an omission of a duty devolving upon him as an incident to such service.

Before entering upon the consideration of the sufficiency of the statutes relied upon to authorize the action of the mayor and aldermen of the city in making an appropriation and appointing a committee to purchase the necessary articles and to supervise the pyrotechnic display on the occasion referred to, it is perhaps best to recur to the rule that a municipality is clothed with those powers only which are granted in express terms, or necessarily or fairly implied from or incident to those expressly granted, and which it is essential to exercise in order to carry out objects and purposes of creating the cor-

poration. 1 Dill. Mun. Corp. § 89 (55); State v. Webber, 107 N. C. 962, 12 S. E. 598. In all of the cases relied upon by plaintiff's counsel it seems that the municipalities had the authority to pass an ordinance or make an order under color of authority. It has not been contended or alleged that the action is founded upon the creation of a nuisance by the city, nor can it be successfully maintained that the use of fireworks is analogous to the case of blocking up a public highway which it is the duty of the municipality to maintain in good condition. The charter of the city (chapter 243, Laws 1891) grants to the mayor and aldermen, when assembled, the following powers:

"Sec. 31. That the aldermen when convened shall have power to make and provide for the execution thereof, such ordinances, by-laws, rules and regulations for the better government of the city as they may deem necessary: provided, the same be allowed by the provisions of this act and be consistent with the laws of the land.

"Sec. 32. The board of aldermen shall contract no debt of any kind unless the money is in the treasury for its payment, except for the necessary expenses of the city government.

"Sec. 33. That among the powers hereby conferred on the board of aldermen, they may borrow money only by the consent of a majority of the qualified registered voters, which consent shall be obtained by a vote of the citizens of the corporation after 30 days public notice, at which time those who consent to the same shall vote 'Approved' and those who do not consent shall vote 'Not Approved'; they shall provide water and lights, provide for repairing and cleansing the streets, regulate the market, take all proper means to prevent and extinguish fires, make regulations to cause the due observance of Sunday, appoint and regulate city policemen, suppress and remove nuisances, regulate, control and tax the business of the junk-shops and pawn-shop keepers or brokers, preserve the health of the city from contagious and infectious diseases; may provide a board of health for the city of Raleigh and prescribe their duties and powers, provide ways and means for the collection and preservation of vital statistics; appoint constables to execute such precepts as the mayor or other persons may lawfully issue to them, to preserve the peace and order, and execute the ordinances of the city; regulate the hours for sale of spirituous liquors by all persons required to be licensed by the board, and during periods of great public excitement may prohibit sales of spirituous liquor by all such persons for such time as the board may deem necessary; may pass ordinances imposing penalties for violations thereof not to exceed a fine of fifty dollars or imprisonment for thirty days. * * * They shall have the right to regulate the charge for the carriage of persons, baggage

and freight by omnibus or other vehicle, and to issue license for omnibuses, hacks, drays or other vehicles used for the transportation of persons or things for hire. They may also provide for public schools and public school facilities by purchasing land and erecting buildings thereon and equipping the same within the corporate limits of the city or within one half mile thereof. They may also construct or contract for the construction of a system of sewerage for the city and protect and regulate the same by adequate ordinances; and if it shall be necessary, in obtaining proper outlets for the said system, to extend the same beyond the corporate limits of the city, then in such case the board of aldermen shall have the power to so extend it, and both within and without the corporate limits to condemn land for the purposes of right-of-way or other requirements of the system, the proceedings for such condemnation to be the same as those prescribed in chapter 49, section 6, of the Private Laws of 1862 and '63, or in the manner prescribed in chapter 49, volume 1 of the Code."

In these provisions of the charter and in sections 3800 to 3805, both inclusive, of the Code, will be found enumerated all of the powers granted to the city by general or special laws. We do not think that the general power to pass ordinances can be held to carry with it by implication any such grant of authority as that to expend the public money for, and conduct under the auspices of the city officers, such a display as that described by the witnesses. We are aware that such authority has been assumed by cities and towns in many of the states, but where the exercise of it has been drawn in question in the courts it has been sustained only when some statute expressly conferred the power to make the appropriation for that particular purpose. As we understand the authorities cited, the supreme court of Massachusetts has given its sanction to the validity of expenditures for such purposes only where some express provision of law was shown to warrant it. In one of the cases cited from that state (*Tindley v. City of Salem*, 137 Mass. 171) the court held that, even where a person was injured by the negligent use of fireworks by the servants of a city that had ordered the display for the gratuitous amusement of the people, under the authority of a statute, the city was not liable to answer in damages. In an earlier case it had been held that a city council must act strictly in pursuance of statutory power to make such displays to subject it to liability for injuries due to the negligence of its servants in the management of it. (*Morrison v. City of Lawrence*, 98 Mass. 219. Where no statutory authority is shown for a wrongful act done under the direction of a municipality, the supreme court of Massachusetts lays down the general rule as to its liability substantially as we have stated it.

Cavanaugh v. Boston, 139 Mass. 426, 1 N. E. 834; Claffin v. Hopkinton, 4 Gray, 502. If there is no authority conferred upon the mayor and aldermen by the statute mentioned, and we can discover none after diligent search and examination, it is immaterial whether the persons in immediate control of the fireworks were servants acting under the direction of the committee appointed by a resolution passed by the mayor and commissioners, and stood in the relation of agents to the city, or whether they were independent contractors. If the authorities of the city acted *ultra vires* in ordering the display, the question whether they employed expert pyrotechnists, and acted upon their advice after securing their services, is equally as irrelevant. If, therefore, it were conceded that the chairman of the committee appointed by the city for the purpose supervised and directed the negligent management of the fireworks, and at such a place as, it was evidence of a want of care to select, we think it was the duty of the

court nevertheless to tell the jury that the mayor and aldermen were not authorized by law to make an appropriation for and direct the management of a display of fireworks, and that the city was not liable to respond in damages for the wrongful or negligent conduct of a servant acting under instructions given by the city, but without authority of law. For the reasons given, we think that the court should have instructed the jury that in no aspect of the evidence was the defendant corporation liable for the acts of its servants in the management of the fireworks. Whether the rulings of the court upon the admissibility of testimony were abstractly erroneous or not is not material, since, whether excluded or admitted, it was manifest that the plaintiff was not, in any view of the evidence, entitled to recover. There was no error of which the plaintiff can justly complain, and the judgment must be affirmed.

MONTGOMERY, J., did not sit.

CITY OF ST. LOUIS v. WESTERN UNION
TEL. CO.

(13 Sup. Ct. 990, 149 U. S. 465.)

Supreme Court of United States. May 15, 1893.

No. 94.

On rehearing. Denied.

For prior report, see 13 Sup. Ct. Rep. 485.

Mr. Justice BREWER delivered the opinion of the court.

In the opinion heretofore announced it was said: "We do not understand it to be questioned by counsel for the defendant that, under the constitution and laws of Missouri, the city of St. Louis has full control of its streets in this respect, and represents the public in relation thereto." A petition for a rehearing has been filed, in which it is claimed that the court misunderstood the position of counsel, and, further, that in fact the city of St. Louis has no such control. Leave having been given therefor, briefs on the question whether such control exists have been filed by both sides, that of the telegraph company being quite full and elaborate.

We see no reason to change the views expressed as to the power of the city of St. Louis in this matter. Control over the streets resides somewhere. As the legislative power of a state is vested in the legislature, generally that body has the supreme control, and it delegates to municipal corporations such measure thereof as it deems best. The city of St. Louis occupies a unique position. It does not, like most cities, derive its powers by grant from the legislature, but it framed its own charter under express authority from the people of the state, given in the constitution. Sections 20, 21, art. 9, Const. Mo. 1875, authorized the election of 13 freeholders to prepare a charter to be submitted to the qualified voters of the city, which, when ratified by them, was to "become the organic law of the city." Section 22 provided for amendments, to be made at intervals of not less than two years and upon the approval of three-fifths of the voters. Sections 23 and 25 required the charter and amendments to always be in harmony with and subject to the constitution and laws of Missouri, and gave to the general assembly the same power over this city, notwithstanding the provisions of this article, as was had over other cities. In pursuance of these provisions of the constitution a charter was prepared and adopted, and is, therefore, the "organic law" of the city of St. Louis, and the powers granted by it, so far as they are in harmony with the constitution and laws of the state, and have not been set aside by any act of the general assembly, are the powers vested in the city. And this charter is an organic act, so defined in the constitution, and is to be construed as organic acts are construed. The city is in a very just sense an "im-

perium in imperio." Its powers are self-appointed, and the reserved control existing in the general assembly does not take away this peculiar feature of its charter.

An examination of this charter (2 Rev. St. Mo. 1879, p. 1572 and following) will disclose that very large and general powers are given to the city, but it would unnecessarily prolong this opinion to quote the many sections defining these powers. It must suffice to notice those directly in point. Paragraph 2, § 26, art. 3, gives the mayor and assembly power, by ordinance, "to establish, open, vacate, alter, widen, extend, pave, or otherwise improve and sprinkle, all streets, avenues, sidewalks, alleys, wharves, and public grounds and squares, and provide for the payment of the costs and expenses thereof in the manner in this charter prescribed; and also to provide for the grading, lighting, cleaning, and repairing the same, and to condemn private property for public uses, as provided for in this charter; to construct and keep in repair all bridges, streets, sewers, and drains, and to regulate the use thereof;" etc. The fifth paragraph of the same article grants power "to license, tax, and regulate * * * telegraph companies or corporations, street-railroad cars," etc. Article 6 treats of public improvements, including the opening of streets. Section 2 provides for condemning private property, and "for establishing, opening, widening, or altering any street, avenue, alley, wharf, market place, or public square, or route for a sewer or water pipe." By section 4 commissioners are to be appointed to assess the damages. By section 5 it is made the duty of these commissioners to ascertain the actual value of the land and premises proposed to be taken, and the actual damages done to the property thereby; "and for the payment of such values and damages to assess against the city the amount of benefit to the public generally, and the balance against the owner or owners of all property which shall be specially benefited by the proposed improvement in the opinion of the commissioners, to the amount that each lot of such owner shall be benefited by the improvement." Except, therefore, for the special benefit done to the adjacent property, the city pays out of its treasury for the opening of streets, and this power of the city to open and establish streets, and the duty of paying the damages therefor out of the city treasury, were not created for the first time by this charter, but have been the rule as far back as 1839.

Further than that, with the charter was, as authorized by the constitution, a scheme for an enlargement of the boundaries of the city of St. Louis, and an adjustment of the relations consequent thereon between the city and the county. The boundaries were enlarged, and by section 10 of the scheme it was provided:

"Sec. 10. All the public buildings, institu-

tions, public parks, and property of every character and description heretofore owned and controlled by the county of St. Louis within the limits as extended, including the courthouse, the county jail, the insane asylum, and the poorhouse, are hereby transferred and made over to the city of St. Louis, and all the right, title, and interest of the county of St. Louis in said property, and in all public roads and highways within the enlarged limits, is hereby vested in the city of St. Louis, and divested out of the county; and in consideration of the city becoming the proprietor of all the county buildings and property within its enlarged limits, the city hereby assumes the whole of the existing county debt and the entire park tax." 2 Rev. St. Mo. 1879, p. 1565.

Obviously, the intent and scope of this charter are to vest in the city a very enlarged control over public property and property devoted to public uses within the territorial limits.

It is given power to open and establish streets, to improve them as it sees fit, and to regulate their use, paying for all this out of its own funds. The word "regulate" is one of broad import. It is the word used in the federal constitution to define the power of congress over foreign and interstate commerce, and he who reads the many opinions of this court will perceive how broad and comprehensive it has been held to be. If the city gives a right to the use of the streets or public grounds, as it did by ordinance No. 11,604, it simply regulates the use when it prescribes the terms and conditions upon which they shall be used. If it should see fit to construct an expensive boulevard in the city, and then limit the use to vehicles of a certain kind or exact a toll from all who use it, would that be other than a regulation of the use? And so it is only a matter of regulation of use when the city grants to the telegraph company the right to use exclusively a portion of the street, on condition of contributing something towards the expense it has been to in opening and improving the street. Unless, therefore, the telegraph company has some superior right which excludes it from subjection to this control on the part of the city over the streets, it would seem that the power to require payment of some reasonable sum for the exclusive use of a portion of the streets was within the grant of power to regulate the use. That the company gets no such right from the general government is shown by the opinion heretofore delivered, nor has it any such from the state. The law in force in Missouri from 1866 gives certain rights in streets to "companies organized under the provisions of this article." Of course, the defendant, a corporation organized under the laws of the state of New York, can claim no benefit of this. It is true that, prior to that time, and by the act of November 17, 1855, (2 Rev. St. Mo. 1855, p. 1520,) the right was given to every

telegraph corporation to construct its lines along the highways and public roads; but that was superseded by the legislation of 1866; and when in force it was only a permission, a license, which might be revoked at any time; and, further, whatever rights, if any, this defendant may have acquired to continue the use of the streets already occupied at the time of the Revision of 1866, it cannot with any show of reason be contended that it received an irrevocable power to traverse the state, and occupy any other streets and highways.

Neither have we found in the various decisions of the courts of Missouri, to which our attention has been called, any denial of the power of the city in this respect. It is true, in *Glasgow v. St. Louis*, 87 Mo. 678; *Cummings v. City of St. Louis*, 90 Mo. 259, 2 S. W. Rep. 130; *Glaessner v. Association*, 100 Mo. 508, 13 S. W. Rep. 707; and *Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co.*, 101 Mo. 192, 13 S. W. Rep. 822,—the power of the city to devote the streets or public grounds to purely private uses was denied; but in the cases of *Julia Building Ass'n v. Bell Tel. Co.*, 88 Mo. 258, and *City of St. Louis v. Bell Tel. Co.*, 96 Mo. 623, 10 S. W. Rep. 197,—it was expressly held that the use of the streets for telephone poles was not a private use. (and of course telegraph poles stand on the same footing,) and that a private corporation carrying on the public service of transportation of messages might be permitted to use the streets for its poles. Counsel rely strongly upon the latter of these cases, in which the power of the city to regulate the charges for telephone service was denied. But obviously that decision does not cover this case. The relations of a telephone or telegraph company to its patrons, after the use of the streets has been granted, do not affect the use, and power to regulate the use does not carry with it by implication power to regulate the dealings between the corporation having such use and its individual patrons; but what the company shall pay to the city for the use is directly involved in a regulation of the use. The determination of the amount to be paid for the use is as much a matter of regulation as determining the place which may be used or the size or height of the poles. The very argument made by the court to show that fixing telephone charges is not a regulation of the use is persuasive that fixing a price for the use is such a regulation. Counsel also refer to the case of *Atlantic & P. R. Co. v. St. Louis*, 66 Mo. 228, but there is nothing in that case which throws any light upon this. It is that it appeared that there was an act of the legislature giving to the railroad company a specific right in respect to the construction of a track within the city limits, and it was held that the company was entitled to the benefit of that act, and to claim the right given by the general assembly, although it had after the passage of

the act proceeded in the construction of the track under an ordinance of the city purporting to give it the privilege. But, as we have seen, the act of November 17, 1855, vested in defendant no general and irrevocable power to occupy the streets in any city in the state through all time. We find nothing, therefore, in the cases cited from the Missouri courts which militates with the conclusions we have drawn as to the power of the city in this respect.

One other matter deserves notice: It will be seen by referring to our former opinion that one of the contentions of the counsel for the telegraph company was that by ordinance No. 11,604 the city had contracted with the company to permit the erection of these poles in consideration of the right of the city to occupy and use the top cross-arm free of charge. We quote this statement of counsel's claim from their brief: "Ordinance 11,604 granted defendant authority to set its poles in the streets of the city without any limitation as to time, for valu-

able considerations stipulated; and having been accepted and acted on by defendant, and all its conditions complied with, and the city having acquired valuable rights and privileges thereunder, said ordinance and its acceptance constitute a contract, which the city cannot alter in its essential terms without the consent of defendant; nor can it impose new and burdensome considerations." And in respect to this, further on, they say: "No question is or can be raised as to the validity of the contract made by ordinance No. 11,604, and its acceptance." But if the city had power to contract with defendant for the use of the streets, it was because it had control over that use. If it can sell the use for a consideration, it can require payment of a consideration for the use; and when counsel say that no question can be made as to the validity of such a contract, do they not concede that the city has such control over the use of the streets as enables it to demand pay therefor?

The petition for a rehearing is denied.

CITY OF CHESTER v. WESTERN UNION
TEL. CO.

(25 Atl. 1134, 154 Pa. St. 464.)

Supreme Court of Pennsylvania. Feb. 20, 1893.

Appeal from court of common pleas, Delaware county.

Assumpsit by the city of Chester against the Western Union Telegraph Company to recover \$1,470, as license tax for 245 poles erected and maintained by defendant in such city from 1885 to 1891. Plaintiff's rule for judgment for want of a sufficient affidavit of defense was made absolute, and defendant appeals. Affirmed.

The city of Chester in 1884 and 1889 adopted two ordinances, by which it was provided that every telegraph company owning telegraph poles within the city limits should pay to the city treasurer a license fee of one dollar upon each new pole to be erected, and one dollar yearly for each pole maintained by the company, and providing penalties for failure to comply with the ordinances. The affidavit of defense denies that there is any power in the city of Chester to levy such a license tax, by ordinance or otherwise, or any authority for so doing, since the Western Union Telegraph Company is an instrument of commerce, and that as measures in aid of, or part of, police regulations, the sums mentioned in the ordinances are largely in excess of the actual sums required for the purpose, and hence void.

John R. Read, Silas W. Pettit, and H. B. Gill, for appellant. Orlando Harvey, for appellee.

PER CURIAM. It was conceded by the appellant company that the city of Chester has the power to impose a reasonable charge for a license to erect telegraph poles within the limits of the municipality. The ordinance of the city imposed a license tax of one dollar per year for each pole. We have

held in a number of recent cases¹ that this amount is not so unreasonable as to justify us in interfering with the discretion of such municipalities.

In this case, however, the court below entered judgment for want of a sufficient affidavit of defense. The affidavit in question contains this averment: "The said Western Union Telegraph Company avers that the sum sought to be recovered in this cause pretends to be imposed, and is sought to be justified, as a license tax, merely, in aid and as a part of a police regulation of the city of Chester, and as such is unjust and unreasonable, in that the amount thereof is wholly disproportioned to the usual, ordinary, or necessary expense of municipal officers of issuing licenses and other expenses thereby imposed upon the municipality of the city of Chester, but is, on the contrary, largely in excess thereof, to wit, at least five times the expense thereof, wherefore the sum is unreasonable, not authorized by law, and therefore void." For the purposes of this case we must treat this averment as true, as far as it goes. The difficulty is, it does not go far enough. It refers only to the usual, ordinary, or necessary expense of municipal officers of issuing licenses, and other expenses thereby imposed upon the municipality. It makes no reference to the liability imposed upon the city by the erection of telegraph poles. It is the duty of the city to see that the poles are safe, and properly maintained; and, should a citizen be injured in person or property by reason of a neglect of such duty, an action might lie against the city for the consequences of such neglect. It is a mistake, therefore, to measure the reasonableness of the charge by the amount actually expended by the city for a particular year, to the particular purposes specified in the affidavit.* Judgment affirmed.

¹ W. U. Tel. Co. v. City of Philadelphia, 12 Atl. 144; City of Allentown v. W. U. Tel. Co.; and City of Chester v. Philadelphia, R. & P. Tel. Co., 23 Atl. 1070.

* This Penna. Rule is not the law outside Penna. itself.

BOROUGH OF SAYRE v. PHILLIPS.

(24 Atl. 76, 148 Pa. St. 482.)

Supreme Court of Pennsylvania. April 18, 1892.

Appeal from court of common pleas, Bradford county.

Action of debt by the borough of Sayre against Harry Phillips to recover a penalty for violation of an ordinance forbidding peddling without first taking out a license. From a judgment for defendant, plaintiff appeals.

J. B. Niles, Deloss Rockwell, J. C. Horton, and H. F. Maynard, for appellant. D'A. Overton, John C. Ingham, and Rodney A. Mercur, for appellee.

WILLIAMS, J. The business of peddling has been treated as a proper subject for police regulation and control in this state since 1784. The legislature has forbidden it to all unlicensed persons, and has prescribed the conditions on which licenses may be obtained from the courts. The necessity for such legislation is a question for the lawmakers. The validity of any particular statute relating to the subject is a question for the courts. The act of 1784, and the supplementary acts, relating to the business of peddling, have been held to be valid, as an exercise of the police power, in many cases, among the more recent of which are Warren Borough v. Geer, 117 Pa. St. 207, 11 Atl. 415; Borough of Sharon v. Hawthorne, 123 Pa. St. 106, 16 Atl. 835; Com. v. Gardner, 133 Pa. St. 284, 19 Atl. 550; Titusville v. Brennen, 143 Pa. St. 642, 22 Atl. 893. By the organization of a city or borough within its borders the state imparts to its creature, the municipality, the powers necessary to the performance of its functions, and to the protection of its citizens in their persons and property. The police power is one of these. Ordinances of cities and boroughs, passed in the legitimate exercise of this power, are therefore valid. An ordinance prohibiting the business of peddling within the municipal limits without a license from the proper municipal officer would seem to be as clearly justified by the police power as a statute prohibiting the same business throughout the commonwealth. But it is very clear that a police regulation must be directed against the business or practice that is harmful, not against one or some of the persons who may be engaged in it. The laws of the state are so framed. They are directed against the business of peddling. The ordinances of cities and boroughs must, in order to be supported as an exercise of the police power residing in the municipality, be directed in like manner at the business. If a statute or a municipal ordinance is in reality directed only against certain persons who are engaged in a given business, or against certain commodities, in such manner as to discriminate between the persons who are engaged in the same trade or pursuit, in aid

of some at the expense of others, such statute or ordinance is not a police, but a trade, regulation; and it has no right to shelter itself behind the police power of the state or the municipality. A law that should prohibit all persons peddling goods manufactured or produced in other states, and permit the same persons to peddle goods of the same character manufactured or produced in this state, would be a trade regulation, discriminating between the productions of this and sister states, and would be incapable of enforcement, because in violation of the constitution of the United States. So a law that should forbid the courts to grant a peddler's license to any person resident in any other state, but should authorize the granting of licenses to citizens of this state, would be bad for the same reason. When the state creates a city or borough, it cannot confer upon the municipality powers that the state does not possess. It cannot give its creature immunity from the settled limitations that bind its own action. The municipality remains a part of the state after its creation as truly as the town or village was a part of the state before it acquired a corporate character. Only in matters of local government is its situation changed. It can have no better right to adopt discriminating trade regulations than the state has.

We come now to consider the ordinance on which this case depends. It professes to prohibit all persons from engaging in the business of peddling or selling goods from house to house, by sample or otherwise, without a borough license; and it fixes the price of a license at a figure that makes, as it was evidently intended to make, the ordinance amount to prohibition. So long, however, as it bears upon all persons impartially it may fairly claim to be a police regulation intended to destroy a business that was regarded as injurious, but at the end of the prohibiting section of the ordinance a proviso may be found which exempts all residents of the borough of Sayre from its operation. The proviso converts the police regulation into a trade regulation. The ordinance, taken as a whole, does not prohibit an injurious business, but injurious competition. That the resident dealer and peddler may enjoy a larger trade, the nonresident peddler is shut out. If the borough authorities may lawfully regulate the business of peddling for the benefit of residents, we see no reason why they may not lay their hands in like manner on every department of trade and of professional labor, and protect the village lawyer and doctor as well as the village grocer and peddler. We are reminded by the appellant that this ordinance is like that which came into notice in Warren Borough v. Geer, supra; and it is urged that the question now under consideration ought, therefore, to be regarded as ruled by that case. That case was well decided on the only issue presented by it. The plaintiff set out in the declaration the

ordinance of the borough, and charged that the defendant had violated it by canvassing from house to house within the borough. The defendant demurred, thus admitting the acts charged and denying the power of the borough to require one engaged in canvassing to take a license. The court below held that the defendant was entitled as of common right to pursue his business, and that the borough was without the power to forbid it. The question came to this court in the form that it had been disposed of in the court below, as a question of power in the borough to require a license from peddlers and canvassers, and we held that the power existed under the act of incorporation, and under the general borough law of 1851. Our Brother Green, who

delivered the opinion of this court, stated the point in controversy thus: "The only question, therefore, is whether the borough of Warren possesses by either express grant or necessary implication the right to enact the ordinance" forbidding the exercise of defendant's employment without a license. We adhere to the doctrine of that case. The present question is whether, under the pretense of police control, trade may be regulated in the interest of resident dealers by making the same business a lawful one to all who live on one side of a municipal line, and an unlawful one to all who live on the other side. We are very clear in our conviction that this cannot be done, and for this reason the judgment is affirmed.

VON STEEN et al. v. CITY OF BEATRICE.
(54 N. W. 677, 36 Neb. 421.)

Supreme Court of Nebraska. March 16, 1893.

Appeal from district court, Gage county; Babcock, Judge.

Action by John H. von Steen and another against the city of Beatrice to enjoin defendant from concluding a contract for street improvements. There was judgment granting perpetual injunction, and defendant appeals. Affirmed.

W. C. Le Hane, Griggs, Rinaker & Bibb, and L. M. Pemberton, for appellants. E. O. Kretsinger and E. R. Fogg, for appellees.

POST, J.¹ * * * * *

2. The total frontage in district No. 9 is, according to the record, 3,280 feet, and the petition purports to have been signed by the owners of 1,855 feet thereof. It is contended that the following names and descriptions of property were illegally counted on the petition: "Alex Graham, Chair'm Co. Board, S. ½ lot 11, block 24, 440 feet; Rt. Rev. Thos. Bonacum, per Rev. A. J. Copellen, lots 11, 12, 13, and 14, block 7, 200 feet; Beatrice school district, by G. C. Soulsbury, president, block 21, 300 feet; J. E. Hays, lot 3, block 10, 60 feet; First Christian Church, by John Ellis, Ch. of trustees, lot 7, in block 35, 140 feet; Charles H. Spencer, lots 5, 6, 7, 8, and 9, block 25, 125 feet; John A. Moor, per J. A. Forbes, agent, lot 8, block 7, 70 feet; Richard Lowe, lot 6, block 22, 140 feet." It will be observed that of the frontage represented by the petition 440 feet is the property of Gage county, and 300 feet belongs to the school district of Beatrice. The question whether public property of like character, viz. the county courthouse and grounds, and the city schoolhouse and grounds, is liable for special assessments for public improvements, as in the case for the paving of streets adjacent thereto, has never been presented to the courts of this state. We find in the decisions upon the subject an irreconcilable conflict of opinion. It is provided by section 2 of our revenue law (chapter 77, Comp. St.) that "the following property shall be exempt from taxation in this state: First, the property of the state, counties, and municipal corporations, both real and personal; second, such other property as may be used exclusively for agricultural and horticultural societies, for school, religious, cemetery, and charitable purposes." Similar provisions have been construed as exempting the property mentioned therein from all contributions in the nature of taxation, whether imposed for public purposes, under the general revenue laws, or for local improvements, such as are denominated "special assessments." Opposing this view is the doctrine, quite as well sustained by authority, that the immunity from taxation

relates only to general state, county, or other municipal taxes, and not to assessments for improvements made under special laws or ordinances, and local in their character. It is not deemed necessary to review the cases cited in support of the different views by their respective advocates, since the solution of the question here presented depends upon a construction of the charter of the defendant city. In subdivision 5S, § 52, art. 2, c. 14, Comp. St., as amended in 1887, we find the following language: "If in any city governed by this act there shall be any real estate not subject to assessment or special taxes for paving purposes, the mayor and council shall have the power to pave in front of the same, and to pay the cost thereof that would otherwise be chargeable on such real estate, in the same manner as herein provided for the paving of intersections of streets and paying therefor." The same provision is found in the acts for the incorporation and government of cities of the first class having over 25,000 inhabitants, and of metropolitan cities. Section 69, c. 12a, and section 69, c. 13a, Comp. St. The meaning of the language quoted becomes apparent only when we assume that, in the opinion of the legislature, public property like that here involved is not liable to assessment for the improving of the streets, under the ordinances of the city. It seems clear to us that the language "real estate not subject to assessment or special taxes for paving purposes" has reference to the property enumerated in section 2 of the revenue law; for, so far as we are aware, no claim of exemption has been made in favor of any other property. We are confirmed in this view from an examination of the act of March 14, 1889, entitled "An act to incorporate cities of the first class having more than eight thousand, and less than twenty-five thousand, inhabitants, and regulating their powers, duties, and government." The last-named act, so far as it relates to improvements of streets and alleys, appears to be a substantial copy of the charter of the defendant city, viz. the act of 1887; but, instead of the provision above quoted from the act of 1887, we find the following: "Provided, further, that if in any city governed by the provisions of this act there shall be any real estate, belonging to any county, school district, or other municipal or quasi municipal corporation, abutting upon the street whereon paving or other special improvements have been ordered, it shall be the duty of the board of county commissioners, board of education, or other proper officers to pay such special taxes; and, in the event of the neglect or refusal of such board or other officers to levy and collect the taxes necessary to pay for such improvements, the city may recover the amount of such special taxes in a proper action, and the judgment thus obtained may be

¹ Part of the opinion is omitted.

enforced in the same manner as other judgments against municipal corporations." The foregoing is the only express provision within our knowledge in any of the acts for the government of cities of the several classes, imposing upon the state, counties, or other municipalities a liability for special assessments. It is not the policy of the law to empower cities in this state to expend public funds for improvements where no liability exists therefor. When we consider the several provisions for the payment by cities for paving streets adjacent to property not liable for special taxes in connection with the exception above noted, the only reasonable construction thereof is that the exemption from taxation in the revenue law in favor of state, county, and school-district property was intended to apply to and include assessments like that involved in this

controversy. Although it is probable the property of the Catholic Church is entitled to exemption upon the same ground as that of the county and school district, the argument for its rejection is rather on the ground of want of authority of the Reverend Coppellen to sign in behalf of the bishop of Lincoln, who holds the title thereto. In view of the conclusion already stated, we have no occasion to consider that question; for when we deduct 440 feet on account of property of the county, and 300 feet for the school district, it is evident that the petition was insufficient to confer jurisdiction upon the city council, and that the ordinance creating district No. 9, and all acts in pursuance thereof, are void.²

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² Part of the opinion is omitted.

KILGUS v. TRUSTEES OF THE ORPHAN-
AGE OF THE GOOD SHEPHERD.SAME v. TRUSTEES OF THE CHURCH
HOME FOR FEMALES.

(22 S. W. 750, 94 Ky. 439.)

Court of Appeals of Kentucky. June 1, 1893.

Appeals from Louisville chancery court.

"To be officially reported."

Two actions by John Kilgus, one against the trustees of the Orphanage of the Good Shepherd, and the other against the Church Home for Females, to enforce liens on defendants' property for the proportionate cost of improving an adjacent street. From judgments in defendants' favor, plaintiff appeals. Reversed.

H. S. Barker and Lane & Burnett, for appellant. Strother & Gordon, for appellees.

LEWIS, J. These two actions, brought by appellant against appellees, respectively, were tried and determined by the lower court together, as will be done on this appeal. The object of each is enforcement of a lien on a lot of land for proportionate cost of improving an adjacent street by appellant in pursuance of an ordinance of the general council, and under contract with the city of Louisville. There is no question made in either action about his compliance with terms of that contract, nor as to correctness of the amounts assessed and fixed; but the ground relied on as defense in each case is exemption from such assessment existing in virtue of special acts of the general assembly. It appears that in 1858 H. P. Johnston conveyed to W. Cornwall and others, in trust, a lot upon which to establish an orphan asylum, to be used as a free home for educating and instructing indigent orphan boys in useful arts and trades; and in 1872 "an act to incorporate the trustees of the Orphanage of the Good Shepherd in the city of Louisville" was passed, whereby W. Cornwall and others, then trustees under the deed mentioned, were declared a body corporate, to whom the several county courts of the commonwealth were authorized to bind orphans upon terms agreed to. Section 6 of that act is as follows: "That all property now held for the benefit of said orphanage, and all which hereafter may be so held, shall be, and the same is hereby, exempted from assessment and taxation under the revenue laws of the commonwealth, or under any ordinance, resolution, or other act of the city of Louisville, and all such property is hereby freed from future charge and payment of taxes to the state and to the city." In 1872 John P. Morton conveyed to James Craik and others a lot upon which were to be erected buildings suitable for a church home for females, an infirmary for females, an infirmary for males, and a chapel; and subsequently "An act to incorporate the Church Home for Females and Infirmary for the Sick" was passed, whereby James Craik

and others were created a body corporate. Section 3 of that act is in the same language as section 6 of the first-mentioned act just quoted, differing from it only in application. The two institutions thus created being manifestly intended for purposes of purely public charities, were by section 9, art. 1, c. 92, Gen. St., independent of the special acts, exempted from taxation for governmental purposes as well of the city of Louisville as of the commonwealth. But taxation for ordinary purposes of government does not properly comprise local assessment for construction of a street, and, as a consequence, exemption by statute from the first does not necessarily or properly involve exemption from the latter. Accordingly, in *Baptist Church v. McAtee*, 8 Bush, 508, it was held that exemptions made in the General Statutes in favor of church property apply only to taxation for general purposes of government, state, county, and municipal, and that, therefore, property of that church was liable for payment of its proper proportion of cost of constructing the particular street there in question. In *Zabel v. Orphans' Home (Ky.)* 17 S. W. 212, the appellant, a contractor, sued to enforce a lien on property of appellee for its proportion of the cost of constructing an adjacent alley, from which the latter claimed exemption in virtue of a special act of the legislature. In that case the following extract from *Burroughs on Taxation* (page 461) was quoted and approved: "The word 'tax' or 'taxes' does not include local assessments, unless there be something in the statute in which it is found to indicate such an intention. The question frequently arises in the construction of statutes exempting persons or corporations from payment of taxes, and the almost unbroken current of authority is that such expression does not include local assessment." The question, therefore, in this case is whether the two acts relied on by appellees, respectively, were intended by the legislature to exempt their property from local assessment. In *Zabel v. Orphans' Home* the provision of the special act is as follows: "The property, money, estate, and rights of said corporation shall be exempt from all taxation whatever." But it was there held the word "tax" did not embrace local assessment, and that something more was needed to show such was the legislative intention. The language of the two acts we are considering is, however, somewhat different from that of the act just mentioned, for it is in both of them provided the property shall be exempt from assessment and taxation under revenue laws of the commonwealth, and also under ordinances of the city of Louisville. But the word "assessment," which means laying a tax, or determining the share of tax to be paid by each individual, relates as well to taxes for support of government as to taxes, or rather enforced contributions, for construction of streets or other local improvements; for the act of assessing must precede collection in either case. It does

not, therefore, seem to us that the word "assessment," used as it is in the two special statutes, without qualification or explanation, necessarily or fairly indicates legislative intention to exempt the property of appellees from any other than ordinary taxation for support of the state and municipal governments; and, not being clearly and expressly exempted from due proportion of the cost of constructing adjacent streets, it cannot be held so exempt without violating a well-established rule of construction, for, as said in Sedgwick on Statutory & Constitutional Law, (page 344,) statutes under which exemptions from common burdens are claimed "are regarded with a jealous eye, and strictly construed." In support of the construction we have given the two statutes in question we cite the case of *State v. Mayor, etc.*, of Newark, 35 N. J. Law, 157. There the Protestant Foster Society claimed exemption from the cost of constructing or improving streets under its charter, by which it was enacted that the property of the society "shall not be subject to taxes or assessments," which is nearly the same language used in the two statutes we are considering. But the court in that case held that the word "taxes" must, in the

absence of any clear indication to the contrary, be understood to refer exclusively to the ordinary public taxes; and that the word "assessments" has reference to burdens of the same general character as those expressed in the word "taxes," and was not intended to include local assessments for municipal purposes. In our opinion, a statute should never be so construed as to exempt a particular person or corporation from taxation for any purpose, whereby the burden falls so much heavier on others having no greater interest at stake or duty to perform, unless the language used clearly and expressly requires it to be done. In these cases it may be fairly presumed that, if the legislature had intended to exempt the property of appellees from the cost of local improvements, it would have been plainly and fully indicated by additional or other words than the single and insufficient term "assessment." Whether the two statutes would be valid if susceptible of the construction contended for by appellees is a question we need not determine, because we think the exemption claimed was not granted. Wherefore the judgment in each case is reversed, and cause remanded for proceedings consistent with this opinion.

CITY OF CLINTON, to Use of THORNTON et al., v. HENRY COUNTY.

(22 S. W. 494, 115 Mo. 557.)

Supreme Court of Missouri, Division No. 1.
May 8, 1893.

Appeal from circuit court, Henry county; D. A. De Armond, Judge.

Action by the city of Clinton, to the use of B. B. Thornton and others, against Henry county, on special tax bill. Judgment was rendered for defendant, and plaintiff appeals. Affirmed.

Peak & Ball and W. C. Stewart, for appellant. James Parks & Son and Pratt, Ferry & Hagerman, for respondent.

BLACK, C. J.¹ * * * * *

1. The first inquiry is whether the constitution or statute exempts this property from such charges. Section 6, art. 10, of the constitution, provides that "the property, real and personal, of the state, counties, and other municipal corporations, and cemeteries, shall be exempt from taxation." And section 7504, Rev. St. 1880, provides: "The following subjects are exempt from taxation: * * * Fourth, lands and other property belonging to any city, county, or other municipal corporation in this state, including market houses, town halls, and other public structures, with their furniture and equipments, and all public squares and lots kept open for health, use, or ornament," etc. While the statute and constitution speak of taxes and taxation, they do not mention local assessments. It is true such assessments are levied by virtue of the taxing power of the state, but there is a broad distinction between local assessments and taxes levied for general public purposes. Thus, it was held in *Lockwood v. City of St. Louis*, 24 Mo. 20, that church property was liable for special sewer assessments, though the general authority given to the city to levy and collect taxes was confined to "property made taxable by law," and, by the general law, church property was expressly exempted from state and county taxation. In *Sheehan v. Hospital*, 50 Mo. 156, the character of the defendant exempted its prop-

erty from "taxation of every kind," and yet its real property was held liable for special street improvement assessments. The exemption was held to relate only to ordinary taxes levied for general purposes, and not to special improvement assessments. The whole subject was again considered in the recent case of *Farrar v. City of St. Louis*, 80 Mo. 379. The assessments there in question were about to be levied for the purpose of paving, curbing, and guttering a street. The law under which the work was done provided that the cost thereof should be levied on the abutting property according to the front feet of each lot, and it was insisted that the law was void because it violated that clause of the present constitution which declares that "all property subject to taxation shall be taxed in proportion to its value;" but this court held that the assessment was not a tax, within the meaning of that clause of the constitution. It was also held that special local assessments were not included in the words of the eleventh section of article 10 of the constitution, which declare that "said restrictions as to rates shall apply to taxes of every kind and description, whether general or special." It must be taken as settled law that the clause of the constitution and the general law before quoted do not refer to or include special local assessments. It follows that this property, though held and used for public purposes, is not exempt from local assessments, either by the constitution or general law. Indeed, the general statute, and the clause of the constitution relating to the exemption of property from taxation, have nothing whatever to do with this case. The question whether public property, such as courthouse property, should share in paying for street improvements, is one open to the legislative will. We must therefore look to the statute relating to cities of the third class to see what the legislature has declared upon this subject. We repeat that the constitution, and general law relating to exemption from taxation, have no bearing upon the issue of law in this case. The question is one of delegated power, and not of exemption from taxation.²

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¹ Part of the opinion is omitted.

² Part of the opinion is omitted.

CHICAGO, M. & ST. P. RY. CO. v. CITY OF MILWAUKEE.

(62 N. W. 417, 89 Wis. 506.)

Supreme Court of Wisconsin. March 5, 1895.

Appeal from circuit court, Milwaukee county; D. H. Johnson, Judge.

Action by the Chicago, Milwaukee & St. Paul Railway Company against the city of Milwaukee to have an assessment of benefits made by the board of public works of the defendant city against property of plaintiff for opening of a public street set aside. From a judgment affirming the assessment, plaintiff appeals. Reversed.

Burton Hanson and C. H. Van Alstine, for appellants. C. H. Hamilton, for respondent.

PINNEY, J. 1. It is contended that the assessment in question is authorized by subdivision 14, § 103S, Rev. St. Neither this section, nor the chapter in which it is found, treats of or has any relation to assessments for special improvements, but relates to general taxation only. This section declares what property shall be exempt from such taxation, and the subdivision relied on is that "the track, right of way, depot grounds and buildings, machine shops, rolling stock, and all other property necessarily used in operating any railroad in this state belonging to any railroad company, including pontoon or pile and pontoon railroads, shall henceforth remain exempt from taxation for any purpose, except that the same shall be subject to special assessment for local improvements in cities and villages." It had been held prior to this statute that such assessments were special taxes, imposed upon the basis of special benefits, and they had been distinguished from general taxes by the name of "assessments." *Weeks v. City of Milwaukee*, 10 Wis. 256, 260; *Hale v. City of Kenosha*, 29 Wis. 605. And the object of the exception, which is in the nature of a proviso, was not to declare a rule upon an independent subject, but to confine the exemption to the subject of general taxation, and to exclude any inference of intention that the section was to be operative as to special taxes or assessments (Endl. *Interp. St.* §§ 184, 186); and the exception could have no operation or force separate and apart from the provision it was designed to limit, and left the liability of such property to assessment as it stood before the statute. This is evident from the grouping of the kinds of property named in the section. The "track, right of way, and depot grounds" are classed with "rolling stock," with "all other property necessarily used in operating any railroad," and "pontoon or pile and pontoon railroads,"—kinds of property which it would be impracticable to subject to assessment for local improvements. *Oshkosh Ry. Co. v. Winnebago Co.* (at the present term) 61 N. W. 1107.

2. Whether the track and right of way of a railroad company are subject to assessment

for local improvements on the ground of special benefits, under the language of statutes couched in general terms providing for such assessments, is a question upon which the courts have not been agreed. The system and policy of each state enter largely into the question, and give to it a local character. By the charter of Milwaukee, the improvement of Commerce street was made "chargeable to and payable by the lots fronting or abutting upon such street * * * to the amount" which such improvement shall be adjudged by the board of public works to benefit such lots; and an assessment of the amount is provided for, which when confirmed by the council, its collection may be enforced in case of nonpayment by a sale and conveyance of the lots so assessed. City Charter, Laws 1874, c. 184, subc. 7, §§ 2, 7. So much of the lots in question as were occupied by the tracks of the railroad and supporting banks, and used for right of way purposes, had been devoted and dedicated to uses in which the public had an important interest of a probable perpetual duration; and to enforce an assessment against such right of way and track, extending about half a mile in distance, by a sale and conveyance, would necessarily dismember and break up the entirety and utility of the road as a line of travel and commercial intercourse, and interfere with and impair the paramount interest which the public have in it for these purposes. The property of the corporation in its road and appurtenances essential to its operation and use, annexed to the franchise of the company to maintain and operate its road, is an entirety, and is thus charged in the hands of the company with an important trust in favor of the public, though the property in all other respects is essentially private, and operated for private gain. Public policy would seem to forbid a severance and segregation of its several special or particular parts, essential to the exercise of the franchises and the use and operation of the road by forced sale upon legal process, or for an assessment. If the general language found in the charters of cities and villages throughout the state on the subject, in substance the same as the provisions of the charter in question, is to be construed as applicable to and warranting an assessment against the track and right of way or other property essential to the exercise of the franchise of the company and the operation of its road, then every railway in the state is liable to be thus severed, and its continuity destroyed, by the action of local authorities in any city or village through which it passes,—a result which we are persuaded was not contemplated in the enactment of the charter of Milwaukee, or other charters for local municipal government. While the company may be compelled by mandamus to operate its road between its termini, and forfeiture of its franchises may be adjudged for its failure (*People v. Albany & V. R. Co.*, 24

N. Y. 261; *People v. Rome, W. & O. R. Co.*, 103 N. Y. 108, 8 N. E. 369; *Railroad Co. v. Hall*, 91 U. S. 354; *State v. West Wisconsin Ry. Co.*, 34 Wis. 215, 217), the company would be rendered powerless to execute its public trust and discharge its public duties. The question is to be judged by the consequences which would attend a complete exercise of the power of assessment, when carried to a sale and conveyance of the property attempted to be charged. The authorities holding that neither the corporate rights and franchise of a quasi public corporation can be sold on execution, nor can its lands or works essential to the enjoyment of the franchise be separated from it and sold under execution, so as to destroy or impair the value of the franchise, were cited and considered in *Yellow River Imp. Co. v. Wood Co.*, 81 Wis. 559, 562, 51 N. W. 1004; and the principle was asserted in *Gue v. Canal Co.*, 24 How. 263, upon the ground stated in that case that the property seized was of little or no value apart from the franchise, but was essential to the operation of the canal, and in connection with it was of great value, and would be rendered valueless by such sale, and that the franchise by which the use of the property was made valuable would not pass by the sale. The track and right of way in this case are not adapted to any other profitable use. A sale of such property on execution, which included the very bed of the road as well as the ground needed for depot and other buildings, was held invalid as to such portions; that no title passed to the purchaser; and that the company must be protected in the possession of all that was really essential to the enjoyment of its franchise. *Railway Co. v. Colwell*, 39 Pa. St. 337. In the case of *Yellow River Imp. Co. v. Wood Co.*, supra, it was held that the principles mentioned "apply with equal force to tax proceedings," upon the ground "that the rights, franchises, and plant essential to the continued business and purposes of a quasi public corporation are not to be severed, broken up, or destroyed without express legislative authority, but, on the contrary, are to be preserved in their entirety, and for that purpose are deemed segregated from any other property owned by the corporation." And it was accordingly held that the value of a dam, an essential portion of the corporate rights, franchises, and plant of the company, was improperly included in the assessment of the tract of land owned by the company, and upon which it was located, and that the tax extended on the assessment was, for that reason, held invalid and canceled. To the same effect is *Fond du Lac Water Co. v. City of Fond du Lac*, 82 Wis. 322, 52 N. W. 439, where it was held that an assessment for taxation of only the lots upon which the pumping works and the station of the company were situated was invalid; that the assessment should have included the entire property of the company, its mains, pipes,

and hydrants, throughout the city, and franchises and privileges, as an entirety, so as to avoid any severance upon sale for nonpayment of taxes. These cases establish the principle that the general provisions of the statute concerning the levying and collection of taxes are to be construed and held subordinate to the rule against severance and segregation of the property essential to the continued exercise of such corporate franchises, and that such a result cannot be effected, under the power of taxation, without express legislative authority, and that general language in such statutes will not be held to authorize such a result. Manifestly, the same rule of construction should be applied to the general language of the charter of Milwaukee, and, in the absence of an express statute authorizing an assessment of the tracks and necessary right of way of a railway company, the assessment and sale thereof for benefits by local improvements cannot be sustained. *People v. Gilon*, 126 N. Y. 147, 27 N. E. 282; *New York & H. R. Co. v. Town of Morrisania*, 7 Hun. 672.

It is universally conceded that all such assessments have their foundation, rest upon, and cannot lawfully exceed, the special benefits of the improvement to the property against which the cost of its construction, to that extent, is charged. 2 Dill. Mun. Corp. 761; *Weeks v. City of Milwaukee*, 10 Wis. 259, 261; *Hale v. City of Kenosha*, 29 Wis. 605, 606; *Donnelly v. Decker*, 58 Wis. 465, 17 N. W. 389; *Hammett v. Philadelphia*, 65 Pa. St. 152 et seq. Such an assessment cannot be maintained for general benefits to the community or locality resulting from the work. For the payment of such expenditures, resort must be had to general taxation, the rule of which is required to be uniform. "Whenever an assessment upon an individual is not grounded upon and measured by the extent of his particular benefit, it is pro tanto a taking of his private property for public use, without any provision for compensation." Per Sharswood, J., in *Hammett v. Philadelphia*, supra. We think it clear, as a matter of law, that property, such as the railroad tracks and necessary right of way, cannot be said to be benefited by the improvement in question; and as said in *City of Philadelphia v. Philadelphia & B. R. Co.*, 33 Pa. St. 43: "It would be strange legislation that would authorize the soil of one public road to be taxed in order to raise funds to make or improve a neighboring one." In *Junction R. Co. v. City of Philadelphia*, 88 Pa. St. 424, it was held that the city could not maintain a municipal claim for paving against or opposite the roadbed of a railroad company, and that it was immaterial whether the company had simply a right of way or owned the bed in fee, and it was said that "the right of way is exclusive at all times and for all purposes, and, moreover, it is perpetual"; and that "a railroad from its very nature cannot derive any benefit from the

paving, while all the rest of the neighborhood may, and it is not to be presumed that the compulsion was intended to be applied to such companies." To the same purport is *Allegheny City v. West Pennsylvania R. Co.*, 138 Pa. St. 375, 21 Atl. 763, in which it was said that, "in a case where we can declare as a matter of law that no such benefit can arise, the legislature is powerless to impose such a burden. It would not be a 'tax,' in any proper sense of the term. It would be a forced loan, and would practically amount to confiscation." In *City of Bridgeport v. New York & N. H. R. Co.*, 36 Conn. 255, it was held that contingent, remote, inappreciable, or uncertain benefits would not authorize an assessment, where an assessment might be made against the franchise of the company, and the track and right of way were not liable to such assessment, and that the benefit in such case must be direct, immediate, and certain. *New York & N. H. R. Co. v. City of New Haven*, 42 Conn. 279. "The fact that the pavement makes access to the station easier shows a benefit to the public at large, but not a special benefit to the company."

It was contended that the assessment of the board of public works is conclusive; that the entire strip in question, including the track and necessary right of way, was benefited by grading and paving of Commerce street; and that the only question open to the appellant was as to the amount of benefits. Section 11, subc. 7, c. 184, Laws 1874, and the cases of *Teegarden v. City of Racine*, 56 Wis. 545, 14 N. W. 614, and *Dickson v. City of Racine*, 61 Wis. 545, 21 N. W. 620, were relied on. The question of benefits to the track and right of way being a legal one, manifestly the assessment cannot be conclusive, but the position is no doubt correct as to the rest of the strip. This precise question was presented in *Allegheny City v. Western Pennsylvania R. Co.*, 138 Pa. St. 382, 21 Atl. 763, where it was held that "while the owner of an ordinary lot of

ground, whether an individual or corporation, cannot be heard to defend against a municipal assessment for paving, for the reason that the law presumes such property is benefited, yet, in the case of the roadbed of a railroad, the presumption of law is the other way. It is the same at all times and under all circumstances; hence the law declares the absence of benefits." But, if the presumption is a disputable one, the evidence on the part of the city did not tend to show any direct, immediate, and certain benefit to the track and right of way, and the only benefit indicated by the testimony was clearly remote and contingent, depending upon the expenditure of considerable sums, and there was nothing to show that it would be judicious or desirable for the company to enter upon the work. The benefit shown, if any, was to the public in facilitating consignees in getting heavy freights from the tracks, and not to the company. Contrary conclusions have been reached in *Illinois Cent. R. Co. v. City of Decatur*, 126 Ill. 92, 18 N. E. 315; *City of Muscatine v. Chicago, R. I. & P. Ry. Co.* (Iowa) 44 N. W. 909; *Railroad Co. v. Connelly*, 10 Ohio St. 159; *City of Ludlow v. Cincinnati S. R. Co.*, 78 Ky. 358; *Appeal of North Beach & M. R. Co.*, 32 Cal. 500. But some of these cases proceed upon quite general reasoning, and are not in harmony with our previous decisions. The result is that the assessment as to the railroad track and necessary right of way was without authority of law, and it should be set aside as to all the premises except that portion of the easterly part of the strip between the street and tracks and necessary right of way. The fact that it is probable, in the near future, this portion of the strip will be required for railway purposes will not serve to protect it against the assessment. *New York, N. H. & H. R. Co. v. City of New Britain*, 49 Conn. 40. As to this part of the strip there should be a new trial. The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

(See *supra* II.,
 761. for discussion of special assessments.)

TAYLOR v. CITY OF WAVERLY.

(63 N. W. 347, 94 Iowa, 661.)

Supreme Court of Iowa. May 22, 1895.

Appeal from district court, Bremer county;
P. W. Burr, Judge.

Plaintiff, the owner of 90 acres of land situated within the incorporated limits of the defendant city, prosecutes this action to cancel certain taxes levied upon said lands for general incorporation purposes for the year 1893, and to restrain the collection thereof. Judgment was entered for plaintiff as prayed. Defendant appeals. Affirmed.

A. M. Potter and Gibson & Dawson, for appellant. G. W. Ruddick, for appellee.

GIVEN, C. J. 1. The grounds upon which plaintiff claims that his lands are exempt from taxation for general municipal purposes other than for road tax are as follows:

"Par. 3. That said lands and each piece and tract thereof is occupied and used in good faith by the owner for agricultural purposes only.

"Par. 4. That none of said lands have been laid out or platted into city lots, nor is it held for future speculation as city property or for platting as such.

"Par. 5. That none of it adjoins any part of the platted portion of said city, nor does any of it lie so near to the platted part of the city that the corporate authorities cannot open and improve its streets and alleys and extend to the inhabitants of the city the usual police regulations and advantages without incidentally benefiting the proprietors in personal privileges and accommodations or the enhancement of the value of any part thereof.

"Par. 6. That none of the land derives any benefit from the water works or the street lighting or the police regulations of said city, or any special advantages from the work done on streets of the city, and none of the lands are needed for the extension of the streets or alleys of said city."

The rule in such cases is stated in *Fulton v. City of Davenport*, 17 Iowa, 405, as follows: "But the rule which we would deduce on this subject, and under which a large majority of cases might, as it seems to us, be determined, is this: When the proprietors of undedicated town property, being locally within the corporate limits, hold such close proximity to the settled and improved parts of the town that the corporate authorities cannot open and improve its streets and alleys, and extend to the inhabitants thereof its usual police regulations and advantages, without incidentally benefiting such proprietors in their personal privileges and accommodations, or in the enhancement of their property, then the power to tax the same arises; but in its exercise great care and circumspection should be observed, lest perchance injustice and oppression may ensue."

In *Durant v. Kauffman*, 34 Iowa, 194, it is said: "The mere fact that lands are included within the limits of a municipal corporation does not authorize their taxation for general city purposes. Under certain conditions, they are exempt therefrom. These conditions are such that the property proposed to be taxed derives no benefit from being within the city limits. This is the rule recognized by the various decisions of this court upon this subject,"—citing cases.*

2. We think the evidence fully establishes each of the allegations made by plaintiff quoted above. The land has always been occupied and used for agricultural purposes only, except that for a time the dwelling house, outbuildings, and ground used therewith were rented for residence purposes to one who was not engaged in farming the land. The land is not adjoining the platted portion of the defendant city, but is remote therefrom, with other unplatted farm lands lying between. None of this land has ever been laid out or platted into city lots, nor does it appear to have been held for future speculation as city property. There is no street or alley extending to these lands, except a public highway, running along the west line thereof. The nearest street, alley, or sidewalk is 200 rods distant from said land, the nearest hydrant 250 rods, the nearest city lamp 250 rods, and the nearest water supply for extinguishing fire is one mile distant, and the property is outside of the reach of the city's fire protection. It is argued on behalf of appellant that the property was not being used exclusively for agricultural purposes, that it was at least incidentally benefited by the police and fire protection afforded by the city, and by the privileges of the city library. We do not think that the mere fact that the house was separately rented from the lands for a time made the use other than it theretofore had been, namely, for agricultural purposes. It is quite evident that this remote place neither needed nor received any protection from the very limited police force of the defendant city, and, as we have said, the property was entirely out of reach of any of the appliances of the city for extinguishing fires. While it is true the occupants of this property might enjoy the privileges of the city library, it does not appear that those privileges were limited to residents within the city limits. The fact is that this land, remote as it is, is not available as city property for either residence or business purposes, under the present demands of the defendant city. It does not adjoin the platted portion of the city, is not needed for streets or alleys, and derives no benefit whatever from taxes expended for city purposes other than the road tax which goes to keep in repair the highway by which the city is reached. We think the case is clearly within the rule as we have quoted it above, and that the judgment of the district court should be affirmed.

*7102 2000 - 20111 2000 :
(See *Rice*, 171-79)

CITY OF LAWRENCEBURGH v. WESLER.

(37 N. E. 956, 10 Ind. App. 153.)

Appellate Court of Indiana. May 29, 1894.

Appeal from circuit court, Switzerland county; A. C. Downey, Judge.

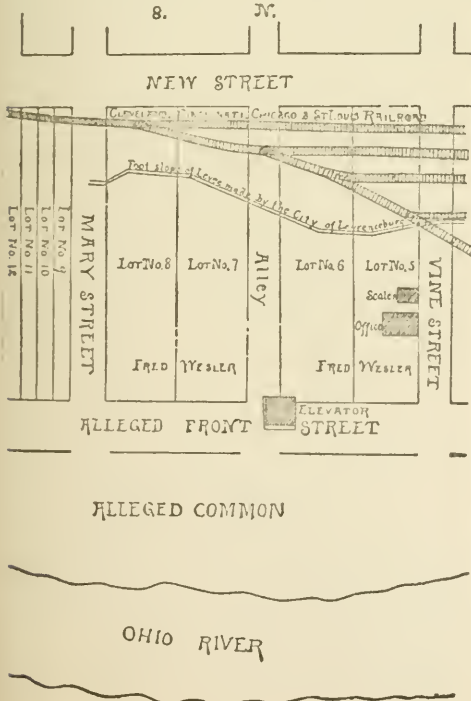
Action by Frederick Wesler against the city of Lawrenceburgh. There was a judgment for plaintiff, and defendant appeals. Reversed.

Warren N. Houck and John K. Thompson, for appellant. Johnston & Shutts, for appellee.

REINHARD, J. The appellee is the owner of lots 5, 6, 7, and 8 in the city of Lawrenceburgh, fronting on or near the Ohio river, on which he conducted the business of a coal dealer, receiving his supplies from barges landing in front of his lots on said river, and selling and delivering at retail to his customers in the city. He brought this action against the appellant in the Dearborn circuit court to recover damages for an alleged taking for levee purposes of portions of said lots, and for consequential damages to the remainder thereof and to his business connected therewith. The venue of the cause was changed to the court below, where, upon issues joined and a trial by jury, a verdict was returned for the appellee in the sum of \$1,050, for which amount the court rendered judgment. Among other errors assigned and discussed is the alleged error of overruling the appellant's motion for a new trial, in which motion the appellant has assigned as causes therefor the giving of certain instructions and the refusal to give others. In order to see the applicability of the instructions given to the facts in the case, it will be well to notice some of the evidence introduced upon the subject to which they relate. The appellee, to establish his title to the property alleged to have been damaged, introduced in evidence certain deeds to lots numbered 5, 6, 7, and 8, and thereby proved the ownership and possession of parts of such lots in himself and grantors since 1869, and other parts since 1880. These lots are situated in the south part of the city of Lawrenceburgh, and run south from New street to a strip of ground fronting on the Ohio river. The appellee also introduced certain deeds and other evidence of title and possession of the strip of ground lying in front of lots 5, 6, 7, 8, 9, 10, 11, and 12, and between such lots and the Ohio river, since the year 1870, and more than 20 years before the beginning of the present action. It will be seen, therefore, that the appellee claimed the title to all the property lying south of New street to the Ohio river, between the east and west boundaries of his lots numbered as above, and all the land south of lots 9, 10, 11, and 12, as far as said river. The appellant did not dispute the appellee's title to lots 5, 6, 7, and 8, as claimed by appellee, but denied that appellee owned any property south of any of said lots which

gave him a right of action against the city for the taking thereof. It was the contention of the appellant that all the ground south of appellee's lots was occupied and used by the city for a street and a common; that said street running east and west along the southern boundary of appellee's lots and the alleged common south of said street, and next to the river, had been dedicated to the public as such by one Samuel C. Vance in the year 1812, and had been accepted and used as such since that time. The alleged wrongful act of the appellant by which the appellee claims to have been damaged was the construction of a certain embankment across the appellee's lots east and west, at points north of said alleged Front street, and north also of the appellee's coal yard, office, scales, and elevator frame. East of appellee's lots, and forming the east line thereof, is Vine street; running north from the river and west of said lots, and forming the west line thereof, is Mary street, running in the same direction. These streets, it is asserted by the appellee, furnished him an outlet for the delivery of his coal to his customers in the city of Lawrenceburgh, and that, by reason of the embankment constructed as above mentioned, the egress from and ingress to his coal yard and business by way of said streets and otherwise has been entirely cut off and destroyed, and the said property and business rendered valueless. The appellant insists, however, that the appellee still has a sufficient outlet from and inlet to his plant, over at least one of said streets, and that his property has consequently sustained but little, if any, deterioration in value. It is the further claim of the city that the appellee's elevator frame, the loss of which the jury were asked to consider as an item of damage, was situated in whole or in part upon the strip of ground over which Front street ran and the corner of an alley between two of appellee's lots, where said alley crosses said Front street. It was and is the contention of appellant that if the appellee's elevator frame was in fact located on said street and alley, in whole or in part, no damage could be recovered by the appellee for that portion of the structure which stood on said street and alley. This position is not disputed by the appellee, his only contention in connection with this point being that there was neither street nor alley at the place upon which the elevator was being placed, but that said frame stood wholly upon his property. To sustain its claim as to the existence of Front street and the common, the appellant introduced in evidence a paper purporting to be a certified copy of a plat made by one Samuel C. Vance in the year 1812, and recorded long before the appellee claims to have been the owner of any of the property in controversy. On this plat a strip of ground south of appellee's lots, and running east and west, is laid off, and designated as "Front Street," and all the ground south of said street, and between it and the Ohio river, is laid off, and desig-

nated as "Common." There was no evidence that Samuel C. Vance was then or at any time before the alleged making of said plat the owner of said land, or that he was in possession of the same under claim of title. It is proper to note here, however, that one of the deeds of the appellee under which he claims title, and which is dated May 4, 1870, purports to have been executed by Samuel C. Vance and others, but whether this grantor is the same Samuel C. Vance who executed said alleged plat is not made to appear. The appellant also introduced parol testimony tending to prove the existence of the common, and that Front street had been used and traveled by the public both before and since the appellee came into possession. This testimony was stoutly controverted by a number of appellee's witnesses, who testified that at no time within their recollection, which extended as far back as that of the appellant's witnesses, had they ever heard or seen any indication of any such street or common. The appellee also contends, as a result of the evidence, that, if Front street or the alleged common ever had an existence as claimed by appellant, they had long since been washed into the river, and that the banks of the latter now extend as far north as the south line of his lots. It must be confessed that as the depth of the appellee's lots are not given in the deed, and there is no satisfactory evidence as to the same, it is a matter of much difficulty to ascertain the exact truth as to this contention. The following diagram will serve to illustrate the location of the premises over which the dispute arises, and the situation south of the lots as contended by the appellant:



Having stated this much of the evidence and the matters in controversy, we proceed to determine the correctness of the instructions complained of. Instruction No. 5 is as follows: "(5) Although a certified copy of a copy of the second or substituted plat of the city of Lawrenceburgh was admitted in evidence, I think that it is not sufficient of itself to show a dedication of the strip of land next to the levee to the city, the public, or to any person. It is not shown by any evidence that the proprietor, whosoever he may have been, was the owner of that part of the land, without which evidence as against the plaintiff there is no dedication of such strips of ground." Assuming that the paper was sufficiently authenticated as a certified copy of the record of the original plat, the question raised by the instruction is whether such plat constitutes prima facie evidence of a dedication, in the absence of some testimony of ownership in the alleged proprietor or donor. The appellee, as we have seen, had introduced evidence tending to show title and possession in himself and grantors for more than 20 years. To overcome this proof, it could have been proper only to show an older or better title in the appellant. It is not disputed that proof of a dedication prior to the appellee's title would have been proper, but the infirmity of such proof here consists in the failure to connect the alleged donor with the dedication as the owner of the property at that time. It is true that there was some evidence which tended to show that the ground had been used by the public for a street and common, but this would not supply the requisite evidence of ownership in the donor if the plat alone was to furnish the evidence of appellant's title, which is the theory of the instruction. While a dedication may be established by user alone, in that case the dedication would have no connection with any plat, and may be said to be implied dedication, which is a different thing from one expressly made by means of a plat or other conveyance. In the case of an implied dedication, established by evidence of user alone, the plat cannot be considered as the basis of such dedication. For these reasons, we think the court correctly instructed the jury that such plat alone was not sufficient to establish the existence of the street or common. The appellant relies upon the case of *Town of Fowler v. Linquist* (Ind. Sup.) 37 N. E. 133 (decided by the supreme court at a recent sitting), as an authority to support its position that the plat introduced was prima facie evidence of a dedication. That was an action against the town for damages for a personal injury caused by an obstruction in a street. To establish the existence of the street a plat was introduced purporting to contain a dedication of the ground for a street. There was evidence showing that the street had been used as such continuously ever since the making of the plat, with the exception of a short time. The court held that, as between the parties

to that action, the plat was prima facie evidence of ownership in the donor, and of his intention to so donate the ground. There was no dispute of the ownership of the property when platted, and the question of title was at most but a very remote one. The use of the street by the public alone might be sufficient to raise a presumption of a dedication, so that the municipal authorities might be compelled afterwards to maintain the street as such. In that case, there was no controversy between the plaintiff and defendant as to which of them was the owner, and it was only necessary or proper to show that there was a street which the city was bound to maintain. In the case before us, ownership was of the essence of importance. It was asserted by the appellee and denied by the appellant. To defeat such ownership after the same was once established, it devolved upon the appellant to show that it, or some person other than the appellee, was the owner at the time of the injury complained of. This it had a right to do by evidence of a dedication of the property by some rightful owner prior to the time the appellee had acquired title. But it was required to show that the dedication was by the owner, and proof of dedication by any person who styled himself "proprietor" on the plat is not sufficient. Had an acceptance and uninterrupted use by the public been established, the case might be different. We grant that if Samuel C. Vance, or any one claiming under him, were asserting title here, instead of the appellee, such a claim could not be sustained, for as to any such person the city could successfully rely upon an estoppel. But here we have not a scintilla of proof that Vance was then the owner or (save that he signed the plat as proprietor) that he ever asserted any title. Dedication is like any other source of title. It must be shown to come from or through the owner of the property. As well might the appellant rely upon a deed from some person not now claiming the ground in dispute, and who is not shown to have been the owner at any time, as to claim title by dedication from some one not shown to have owned the property. If the owner is proved to have platted the ground on which the alleged street is situate, or has done other acts showing a dedication, such as selling lots with reference to the plat on which the street is laid out, or by accepting a plat made to show such street, it will be sufficient evidence of dedication. Elliott, Roads & S. § 129. But the mere showing that some one, not proved to be the owner, had placed on record a map or plat in which a street or highway is laid off, will raise no presumption against a party in possession who has proved title in himself, coupled with possession for more than 20 years. It is our opinion, therefore, that the court committed no error in giving this instruction.

The sixth and seventh instructions given

by the court at the request of the appellee read as follows: "(6) The owner of a town or city lot abutting upon a public street or alley is also the owner of the land opposite his lot to the center of such street or alley, subject only to the right of the public to the use of such street or alley as and for a public highway. A street or a part of a street may be abandoned by a town or city, with the acquiescence of the citizens thereof, for such length of time as to cease to be a public street, and, when it thus ceases to be a public street, the owner of the abutting lot becomes the absolute owner of the street to the center. If, in this case, the plaintiff is and was at the commencement of this action the owner of lot No. 6, mentioned in his complaint, and said lot abutted upon Front street, or what was once Front street, and that part of Front street abutting said lot had been abandoned so that the same had ceased to be a public street, then the plaintiff had a right to erect his elevator as far out from the line of said lot as the center of said street. (7) Whether said Front street had been abandoned so as to cease to be a public street is a question of fact for the jury to determine, and in determining that question the jury may consider the fact that said street has not been worked and kept in repair by the public, if that fact is proven; whether or not it is now so marked upon the surface of the ground as to be recognized as a public street; whether there are indications of its having been used; whether in fact it is used by the public generally; its present beginning and termination; if there is any evidence upon these points, together with all other evidence bearing upon that question. The mere fact that such street may be designated upon a map or plat of the city is not of itself conclusive evidence of the existence of such street at this time." These instructions are vigorously assailed by the appellant's counsel, and as earnestly and ably defended by counsel for the appellee. The importance of the questions involved, no less than our high regard for the opinions of the learned and usually accurate judge who presided at the trial, have prompted us to give such question much careful consideration; and our examination of the authorities has convinced us that the doctrine enunciated in the instructions cannot be upheld. That which we regard as the fundamental error underlying the instructions is the assumption that proof of a failure on the part of the authorities to keep a street in repairs, or of a mere nonuser of a portion or all of such street by the public for a considerable time, will authorize a jury to infer an abandonment. While there are in the books some general expressions to the effect that an abandonment of a highway may be proved by facts showing a nonuser for a long time, such statements must be considered with certain qualifications as to conditions which

have no existence here. That there may be instances in which, by the acquiescence of the public along the line of a highway in its occupancy and the erection of improvements thereon, an estoppel may be created, must be conceded. *Hamilton v. State*, 106 Ind. 361, 7 N. E. 9; *Railroad Co. v. Shanklin*, 98 Ind. 573. And there is likewise good authority in support of the doctrine that a public highway, other than a street or alley, in a city or town, which has been created by implied dedication, may be abandoned by the public, and the same rule may be applied to a public square, and perhaps a common, in a city or town. *Town of Freedom v. Norris*, 128 Ind. 377, 27 N. E. 869. But there is no element of estoppel in the present case, nor does the doctrine of abandonment of ordinary easements apply to streets or alleys. Certainly the mere occupancy of a street by an individual without objection by the municipal authorities creates no estoppel. In the case at bar, the only building or structure or improvement of any kind erected upon what is claimed to be Front street, and the alley crossing it, was the appellee's elevator, and even this, according to the appellee's own testimony, was placed there as recently as the year 1889, and is not yet completed, and hence, even if the building of the elevator could be construed as a claim under adverse possession, it would not be barred by the statute of limitations. The streets of a city or town are public highways, and, under our system of government, they belong to the people of the municipality. Such streets may be established by grant or dedication, express or implied. "Once a highway, always a highway," was a maxim of the common law, and it applies with peculiar force to the streets of cities and towns. The control of such streets, and their improvement and maintenance, are among the governmental functions of the municipal officers. These cannot, by their failure to discharge the duties devolving upon them, deprive the public, whose servants and agents they are, of its right to the use of such streets, nor will the mere failure to use the same by the public be treated as abandonment, even though such nonuser extend over the entire period covered by the statute of limitations applicable in cases of

adverse possession. *Wolfe v. Town of Sullivan*, 133 Ind. 331, 32 N. E. 1017; *Check v. City of Aurora*, 92 Ind. 107; *Sims v. City of Frankfort*, 79 Ind. 446; *Brooks v. Riding*, 46 Ind. 15.

It is not altogether certain that the plat introduced in evidence, when taken in connection with the testimony showing that the street had been used as such, is entirely without probative force. Taken by itself, and without evidence of ownership by the donor, it is of no value as tending to establish a dedication. But, when considered with the proof of user and the circumstance that Samuel C. Vance was a grantor through whom the appellee claims title, the jury was not without some evidence of express dedication and acceptance. The jury had the right to determine from the evidence whether there had been a dedication of Front street, either expressly or by implication, and, if they found that it had not been so dedicated or accepted, the ground belonged to the appellee, and he would be entitled to recover his damages on account of the elevator, as well as the other property. But if they found that Front street and the alley crossing the same had a real existence among the streets and alleys of the city of Lawrenceburgh, then whatever rights the appellee had in the soil of such street were subject to the easement of the public, and he had no right to erect his elevator thereon, and can recover no damages for being deprived of the use of the same in the place where it is erected. There was, in our opinion, no evidence which would justify the jury in deciding that there had been an abandonment of Front street, provided it ever had an existence. There was but one way in which such street could have been lawfully abandoned in our view, and that was by a proceeding to vacate the same.

There being no special verdict in this case, nor answers to interrogatories, we are unable to determine how much, if any, allowance the jury made to the appellee on account of the elevator, and hence the only course that is left us to remedy the error committed by the giving of the instruction is to direct a new trial. Other errors assigned and discussed need not now be considered. Judgment reversed.

CITY OF MT. CARMEL v. SHAW et al.

(39 N. E. 584, 155 Ill. 37.)

Supreme Court of Illinois. Jan. 14, 1895.

Appeal from appellate court, Fourth district.

Bill by Maria L. Shaw and James I. Shaw against the city of Mt. Carmel, to enjoin the city from cutting down two shade trees. Complainants obtained a decree, which was modified by the appellate court. 52 Ill. App. 429. Defendant appeals. Reversed.

George P. Ramsay, for appellant. Mundy & Organ, for appellees.

BAKER, J. By the general incorporation act under which the city of Mt. Carmel is organized, it has power to lay out, establish, open, alter, widen, extend, grade, pave, or otherwise improve its streets and sidewalks, and vacate the same. It may do anything with its streets which is not incompatible with the end for which streets are established. *Roberts v. City of Chicago*, 26 Ill. 249; *Murphy v. City of Chicago*, 29 Ill. 279. And where the municipal authorities are acting within their well-recognized powers, or are exercising a discretionary power, a court of equity has no jurisdiction to interfere, unless the power or discretion is being manifestly abused, to the oppression of the citizen. *Brush v. City of Carbonale*, 78 Ill. 74. The rights of the parties to this controversy seem to depend largely upon the question whether the city, under its power to vacate streets, has power to vacate only a portion of a street. Under the familiar rule that the whole of a thing includes all of its parts, it would seem that it has. In *Village of Hyde Park v. Dunham*, 85 Ill. 569, this court, speaking of the village there a party, said: "The corporate authorities are vested with complete control, as is every other municipal corporation, over its streets. They may contract or widen them whenever, in their opinion, the public good shall so require. Property owners purchase and hold subject to these powers, and they have no vested right to deny the widening, contracting, or otherwise improving any street." From the decisions in *City of Chicago v. Union Bldg. Ass'n*, 102 Ill. 379, and *People v. Village of Hyde Park*, 117 Ill. 462, 6 N. E. 33, there is a plain implication that a municipal corporation may vacate a part of a street, as distinguished from the vacation of an entire street. In *Meyer v. Village of Tewtopolis*, 131 Ill. 552, 23 N. E. 651, an ordinance of the village, vacating a certain portion of a street in that village, was held valid. In *Smith v. McDowell*, 148 Ill. 51, 35 N. E. 141, the ordinance was not held invalid on the ground that only a portion of the street was vacated. It was a part of this particular case that the ordinance assumed to vacate, not the whole, but a portion only, of the street there involved, but the gist of the decision was that the

corporate authorities had no power to so vacate for the sole benefit and use of a private person. The vacation of an entire street, under like circumstances, would be alike ultra vires. The rule then laid down would be applicable to the case of a whole street, as well as to that of a portion of it. We said: "The municipal corporation holding and controlling its streets in trust for the use of the general public, without power of converting them to any other use, it follows, necessarily, that the right to 'vacate the same' is to be exercised only when the municipal authorities, in the exercise of their discretion, determine the street is no longer required for the public use or convenience." No reason is perceived why a city council might not, under some circumstances, and in the exercise of a sound official discretion, conclude that a portion of a street, either in length or in width, was not necessary for public use and convenience, and that public interests would be subserved by vacating the same, and thus freeing the municipality from the duty and burden of keeping it in good and safe condition and repair. This case is wholly different from *Smith v. McDowell*, supra. It conclusively appears upon the face of the ordinance, as well as from other evidence in the record, that the vacation of parts of the public streets was for entirely legitimate purposes, and in furtherance of what the city council, in the exercise of the discretion vested in them by the statute, deemed a wise and salutary public policy. The streets were all 99 feet wide, and it was evidently concluded that so great a width of streets was not required for public use and convenience, except in respect to Market street,—the business street of the city. And so the ordinance was passed, and the cost of paving and maintaining a useless width of public highway lifted from the shoulders of the municipality and its taxpayers.

It is claimed that section 4 of the ordinance is void; that the city authorities had no power to sell, donate, or give away parts of the public streets that they held in trust. It is ordained in the ordinance "that a strip two feet wide next to the property, lands, lot or lots abutting on said streets, shall be and is hereby vacated." It is admitted that the original plat of the city and streets was signed by the attorney in fact of the proprietors of the land, and that this makes it a common-law dedication of the streets. *Goselin v. City of Chicago*, 103 Ill. 623; *Earll v. City of Chicago*, 136 Ill. 277, 26 N. E. 370; *Thomsen v. McCormick*, 136 Ill. 125, 26 N. E. 373. It therefore resulted, when the strips two feet wide were vacated by the city, that they became parts of the lots adjoining them, and the lot lines were extended two feet. And it also resulted that, by operation of law, the titles of the owners of the abutting lots to the portions of the strips located in front of their respective lots became absolute, and freed from the incumbrance of the easements that had been upon them. It fol-

lows that the concluding words of the section, to the effect that the strip taken from the streets was donated and given to the lot or lots, were but mere surplusage.

The ordinance of 1891 was and is valid. And when the city council, by the ordinance of July 25, 1892, made provision for the construction of a brick sidewalk six feet in width on the north side of Sixth street, and that it should be made and constructed along the outside line of said street, and adjoining the lot or lots abutting on said street, the line so fixed by the ordinance applied to, and was coincident with, the lot line and street line as fixed by the prior ordinance of 1891. Shade trees in the public streets of a city are the property of the municipality, and it has complete control over them. *Baker v. Town of Normal*, 81 Ill. 108. There was nothing unlawful in the conduct of the city officials. The council had authority to order a brick sidewalk six feet wide to be built along the line of the street, and adjoining the lot of appellees. It is to be presumed that there was a public necessity for its construction. At all events, that was a matter that the statute submitted to their discretion. The two large trees were in the line of the sidewalk ordered, and the larger part of their bodies was within the limits upon which the sidewalk was located by the ordinance.

The sidewalk could not be constructed in conformity with the ordinance without cutting them down, and removing them. If left standing, they would be permanent obstructions. We do not think that the proposed action, in the premises, of the city officials, can justly be regarded as wanton, or as so unreasonable and oppressive as to give a court of chancery jurisdiction to interfere. *Brush v. City of Carbondale*, 78 Ill. 74. In fact, it seems to us that it would be more unreasonable to destroy the symmetry and impair the convenience and safety of the sidewalk, by either leaving obstructions in it that are two feet in diameter, or by turning it out on the south side of the trees, six or seven feet into the roadway of the street, or by contracting it on the north side of the trees to the width of four feet, than it would be to cut down the trees that do not belong to appellees, but afford shade to their premises. In our opinion, both the decree of the circuit court, and that decree as modified by the appellate court, are erroneous, as is also the judgment of affirmance. The judgment and the decrees are reversed; and the cause is remanded to the circuit court, with directions to dissolve the injunction and dismiss the bill of complaint, for want of equity, at the cost of the complainants therein. Reversed and remanded.

DRUMMOND v. CITY OF EAU CLAIRE.

(55 N. W. 1028, 85 Wis. 556.)

Supreme Court of Wisconsin. June 21, 1893.

Appeal from circuit court, Eau Claire county; J. K. Parish, Judge.

Action by David Drummond against the city of Eau Claire. Judgment for defendant. Plaintiff appeals. Reversed.

Wickham & Farr, for appellant. L. A. Doolittle, for respondent.

CASSODAY, J. The defendant seeks to justify the judgment on the ground that the claim filed by the plaintiff with the city clerk for the action of the common council was for damages by reason of the lawful change of grade in front of the plaintiff's premises, whereas the complaint based upon such claim, served and filed after the cause was appealed to the circuit court, is for damages by reason of the unlawful change of such grade; and in support of his contention he relies upon *Smith v. City of Eau Claire*, (Wis.) 53 N. W. Rep. 744. In that case the claim filed stated the facts in detail, and clearly showed that the damage claimed was for a lawful change of grade; and it was merely held that the plaintiff could not, on appeal, change his cause of action by claiming damage for an unlawful change of grade. In the case at bar the claim filed was general; being, simply, "For damage caused by change of grade, \$1,500." It did not even describe the plaintiff's premises. But it does not appear that the plaintiff had any other premises to be affected by such change of grade, and the common council acted upon it, and disallowed it, without regard to its informality; and then, in the stipulation between the parties for formal pleadings, such filing, disallowance, and appeal are recited, and it is therein stated that the plaintiff claims "damages of said city for changing the grade of Bridge street, a certain highway of said city in front of the premises of said plaintiff," therein described. The complaint filed and served in pursuance of that stipulation was expressly based upon that claim, and the sufficiency of that complaint was sustained on demurrer by the trial court, and the order sustaining the same was affirmed by this court. 79 Wis. 97, 48 N. W. Rep. 244. Such being the state of the record, we cannot hold that the complaint fails to state a cause of action, nor that the claim filed was insufficient to sustain the action.

2. It seems to be conceded that the attempt to re-establish the grade of the street in question was abortive, and that the raising of the same several feet in front of the plaintiff's premises was without any lawful authority. This being so, it is manifest that the plaintiff is entitled to recover any damages sustained by reason of such trespass upon, and injury to, his premises. *Crossett v.*

City of Janesville, 28 Wis. 420; *Hamilton v. City of Fond du Lac*, 40 Wis. 47; *Dore v. City of Milwaukee*, 42 Wis. 108; *Meinzer v. City of Racine*, 68 Wis. 241, 32 N. W. Rep. 139; *Id.*, 70 Wis. 561, 36 N. W. Rep. 260; *Id.*, 74 Wis. 166, 42 N. W. Rep. 230; *Addy v. City of Janesville*, 70 Wis. 401, 35 N. W. Rep. 931; *Drummond v. City of Eau Claire*, 79 Wis. 97, 48 N. W. Rep. 244. The important question for determination is the measure of such damages. In *Crossett v. City of Janesville*, supra, the trial court charged the jury that the plaintiff was entitled to recover "for all the direct and proximate damages to her premises, caused by the grading in question," and "that the measure of the plaintiff's damages was the actual depreciation in the value of her lots by reason of the grading having been done at the time and in the manner it was done." The correctness of the charge, however, was not challenged upon such ground, but was assumed by this court. The same is true with respect to *Meinzer v. City of Racine*, supra, where the charge was substantially the same. In *Addy v. City of Janesville*, 70 Wis. 401, 35 N. W. Rep. 931, it was held, in effect, that, "where a city, by unlawfully raising a street above the established grade, causes surface water to flow or accumulate upon an abutting lot, it is liable to the lot owner for the injury occasioned thereby;" that, under a complaint alleging such unlawful raising of the street, it was competent to prove "the insufficiency of a culvert by which such water might have been conducted away" from the plaintiff's lots. It was there contended that the city was not liable for such consequential damages from mere surface water by reason of such change of grade, and numerous cases in this court were cited in support of such contention. In answer to such contention, *Cole, C. J.*, speaking for the court, there said: "These cases are inapplicable to the present, for the obvious reason that here the common council had no authority to change the grade without taking the steps prescribed by the charter to give them power so to do." The trial court, in that case, charged the jury "that the city had shown no authority whatever for raising the grade, and if such raising of the grade, without sufficient culverts or gutters to carry off the waters as rapidly as they were carried off before, produced injury to the plaintiff, the raising was, as to her, unlawful; and if done by the city, or if the city ratified the raising of the grade after it was done, by paying for the work, the city was liable to her for all damages which naturally resulted from the raising of the grade, with its insufficient gutters or culverts to conduct the waters as rapidly as they flowed off before the grade was raised." An exception to this portion of the charge was there overruled. That case was cited approvingly by Mr. Justice Orton when the case at bar was here on the former appeal; and he there said, in effect, that as the grad-

ing was done without authority, and unlawfully, the city was "liable to the plaintiff for such damages as he had suffered, which were caused by it." 79 Wis. 102, 48 N. W. Rep. 244. Such are the adjudications of this court in respect to the measure of damages in cases where the regrade was done without authority of law. On the other hand, this court has, in effect, frequently held that where a change of grade in a street is made under authority of law, and with due care, the municipality is not liable for consequential injury to abutting lots, unless made so by statute or the constitution. *Smith v. City of Eau Claire*, 78 Wis. 457, 47 N. W. Rep. 330; *Wallich v. Manitowoc*, 57 Wis. 9, 14 N. W. Rep. 812; *Harrison v. Board*, 51 Wis. 662-665, 8 N. W. Rep. 731; *Tyson v. City of Milwaukee*, 50 Wis. 78, 5 N. W. Rep. 914; *French v. City of Milwaukee*, 49 Wis. 584, 6 N. W. Rep. 244; *Stadler v. City of Milwaukee*, 34 Wis. 98; *Stowell v. City of Milwaukee*, 31 Wis. 523; *Church v. City of Milwaukee*, Id. 512. In the case at bar the trial court, in charging the jury, apparently followed the rule of law laid down in the case last cited. The provision of the city charter upon which that case was based was to the effect that all damages, costs, and charges arising from a change in the grade of the streets therein should be paid by the city to the owner of any lot injured thereby; and it was "held that while any peculiar or special benefit conferred upon the plaintiff's lot, not common to other lots in the neighborhood, and not increasing its market value, could not be considered by the jury in fixing the damages, yet if such lot, in consequence of the changed grade, was appreciated in value in common with the other property in that locality, the city was entitled to have such increase of value deducted, in the estimation of damages." The rule of law stated in that case and in *Stow-*

ell v. Milwaukee, supra, as explained in *Tyson v. City of Milwaukee*, 50 Wis. 85-89, 5 N. W. Rep. 914, is only applicable where such regrade is under lawful authority; but has no application to a case like the one at bar, where the regrade is confessedly without any lawful authority. Hence, it was error for the trial court to follow that rule in the case at bar. It would be anomalous to hold that one may enter upon and injure the land of another, without any lawful authority, as a mere trespasser, and then defeat an action therefor on the ground that such unlawful acts were beneficial to the land or its owner. It is well settled that one who makes such wrongful entry upon land, and erects fixtures thereon, thereby loses title to the fixtures. *Huebschmann v. McHenry*, 29 Wis. 655; *Kimball v. Adams*, 52 Wis. 554, 9 N. W. Rep. 170. The plea of good faith by such trespasser is not even available in equity, as against the rightful and equitable owner of the land. *Honzik v. Delaglise*, 65 Wis. 501, 27 N. W. Rep. 171, and cases there cited. Such trespasser is, in all cases, liable to actual damages; and, although he may have benefited the land, still he would be liable, at least, for nominal damages. *Murphy v. City of Fond du Lac*, 23 Wis. 365; 3 Sedg. Dam. § 923. The measure of damages, in such case, is the amount of injury directly resulting from the unlawful acts committed. Id. In trespass quare clausum the plaintiff may be entitled to consequential damages. Id. § 927. But it is unnecessary to continue the discussion, since the rule sanctioned by this court in the cases of *Crossett v. City of Janesville* and *Addy v. City of Janesville*, cited, where such regrading was without authority of law, seems to be substantially correct. For the errors in the charge, referred to, the judgment of the circuit court is reversed, and the cause is remanded for a new trial.

CITY OF CHICAGO v. BURCKY.

(42 N. E. 178, 158 Ill. 103.)

Supreme Court of Illinois. Oct. 11, 1895.

Appeal from appellate court. First district.

J. M. Palmer, W. S. Johnson, and B. Boyden, for appellant. Alex. Clark, for appellee.

CRAIG, C. J. The viaduct and its approaches, constructed along the south line of Sixty-First street, was about one-quarter of a mile long, and extended from Wentworth avenue to State street. The construction of the viaduct opposite the plaintiff's land prevented the laying out of any streets south, and stopped all travel in that direction, while the vacation of that portion of Sixty-First street crossed by the railroad tracks stopped all travel west, so that the property of plaintiff, abutting on Sixty-First street, between the railroad tracks and State street, was shut in, and all access shut off from the south and from the west. By the construction of the viaduct south of plaintiff's property, and by closing the street west of the property, and thus stopping all communication south and west, it is plain that plaintiff's property was seriously damaged; but it is contended that the damages she has sustained are not special in their character, but are of the same kind as those sustained by the general public, and upon this ground no recovery can be had. If the damages sustained by the plaintiff are of the same kind as those sustained by the public at large, differing only in degree, and not in kind, or if the damages sustained by the plaintiff are of the same kind sustained by the general public, the only difference being in the excess of damages sustained by plaintiff, then, under the well-settled rules of law which control cases of this character, she could not recover. *City of Chicago v. Union Bldg. Ass'n*, 102 Ill. 379; *City of East St. Louis v. O'Flynn*, 119 Ill. 200, 10 N. E. 395; *Parker v. Catholic Bishop*, 146 Ill. 158, 34 N. E. 473. Where damages are sustained by the public at large, but in different degrees, the law does not confer a remedy. Thus in *Davis v. Com'rs*, 153 Mass. 218, 26 N. E. 848, it is said: "The general doctrine is familiar that ordinarily one cannot maintain a private action for loss or damage which he suffers in common with the rest of the community, even though his loss may be greater in degree." The reason for the rule is that a contrary doctrine would encourage many trivial suits. In *Shaw v. Railroad Co.*, 159 Mass. 597, 35 N. E. 92, the court say: "The only right of the plaintiff to use the highway is that of the public generally. Where one suffers in common with all the public, although from his proximity to the obstructed way, or otherwise, from his more frequent occasion to use it, he may suffer in a greater degree than others, still he cannot have an action, because it would cause such a multiplicity of suits as to be, of itself, an intolerable evil." In *Smith v. City of Boston*, 7 Cush. 254, in passing on the question, the court held that a landowner could not recover unless he suffered a special

damage, not common to the public. In *Heller v. Railroad Co.*, 28 Kan. 446, in the discussion of the question, the court said: "Where a party owns a lot which abuts upon that portion of the street vacated, so that access to the lot is shut off, it is clear that the lot owner is directly injured, and may properly challenge the action. The closing up of access to the lot is the direct result of the vacating of the street, and he, by the loss of access to his lot, suffers an injury which is not common to the public. But in the case at bar access to plaintiff's lots is in no manner interfered with. The full width of the street in front and on the side is free and undisturbed, and the only real complaint is that, by vacating the street away from her lots, the course of travel is changed; but this is only an indirect result." In the decision of the question in *City of Chicago v. Union Bldg. Ass'n*, 102 Ill. 379-400, it is said: "In the *American Law Register* for October, 1880, one of the learned editors of that periodical, Mr. Edmund H. Bennett, in a note to *Fritz v. Hobson*, after a very elaborate review of the principal cases bearing upon the question now before us, comes, as we think, very correctly to the conclusions: First. For any act obstructing a public and common right, no private action will lie for damages of the same kind as those sustained by the general public, although in a much greater degree than any other person. Second. An action will lie for peculiar damages of a different kind, though even in the smallest degree. Third. The damages, if really peculiar, need not always be direct and immediate, like the loss of a horse, but may be as remote and consequential as in other cases of tort. Fourth. The fact that many others sustain an injury of exactly like kind is not a bar to individual actions of many cases of a public nuisance." Other cases holding a like doctrine might be cited, but we have referred to enough to show the current of authority bearing on the question.

There is less difficulty in determining what the law is, than in making a proper application of the law to the different cases that may arise. In this case we think it plain that plaintiff was entitled to recover. Her property fronted on Sixty-First street. It extended west to, and cornered with, that part of the street which was vacated. By the vacation of the street and the erection of the viaduct, her property, extending from the railroad tracks east to State street, was shut in, and all access from the south and the west was shut off. What was originally a thoroughfare along the entire line of plaintiff's property, fronting on Sixty-First street, was, by the action of the town, turned into a blind court. No other property was damaged or affected in the same way, except the small tract lying between Wentworth avenue and the railroad tracks. The property of the general public was not affected like plaintiff's, nor were the damages sustained by the public of the same kind. Before the action taken by the town, plaintiff's

property, fronting on Sixty-First street, was so situated that it was available as lots for business purposes, but, after the action of the town, it was rendered useless for that purpose.

It is also claimed that by making the subdivision, and opening Butterfield street, which separates plaintiff's property from the vacated portion of Sixty-First street, plaintiff has barred herself of the right to recover. When the street was cleared up, and the viaduct constructed, the town became liable to pay such

damages as the plaintiff had sustained. The rights of the parties, so far as the question of damages was concerned, were fixed, and any future subdivision which the plaintiff might make of her property could not deprive her of a right to recover such damages as she had sustained. From what has been said, if we are correct, the instruction did not announce a correct rule for the determination of the case, and it was properly refused. The judgment of the appellate court will be affirmed. Affirmed.

CITY COUNCIL OF AUGUSTA v. BURUM
et al.

(19 S. E. 820, 93 Ga. 68.)

Supreme Court of Georgia. Dec. 18, 1893.

Error from superior court, Richmond county; H. C. Roney, Judge.

Petition by P. & G. Burum & Co. and others to restrain the city council of Augusta from the execution of a resolution providing for the removal of awnings and hanging signs. An injunction was granted, and defendant brings error. Reversed.

J. S. Davidson, for plaintiff in error. W. W. Montgomery and J. R. Lamar, for defendants in error.

LUMPKIN, J. 1. By a special act approved November 23, 1814 (Acts 1814, p. 36; City Code Augusta, p. 346), "to prevent encroachments on the streets and highways in the city of Augusta, and to remove such as now exist," the municipal authorities of that city were given full power to remove any "obstruction or encroachment upon the streets or highways, within the limits of said city, at the expense of such person or persons as shall cause the same." The method of exercising the power thus conferred is pointed out in section 6 of that act, which declares "that the said city council of Augusta shall have full power and authority to make such by-laws, rules and regulations, as they may deem necessary, fully and effectually to prevent encroachments on the said streets and highways hereafter, and to remove such as now exist, and such as may hereafter exist, as in their opinion may be least burthensome to the citizens, and best calculated to promote the good order and welfare of said city and its inhabitants." Undoubtedly, in the exercise of the powers incident to this grant of control over the streets of the city, the municipal government could, by ordinance, peremptorily prohibit the erection of any awning, of whatever material or however constructed, which encroached ever so little upon a street or sidewalk; and, as to an awning built in violation of such ordinance, the city authorities could cause the same to be summarily torn down, with or without notice to the owner. The record, however, discloses that awnings have existed in Augusta from a time "when the memory of man runneth not to the contrary," and that no official action was taken by council in respect to such structures until 1857, about 43 years after the passage of the act of 1814. Prior to 1857, the municipal authorities seem to have acquiesced in the erection of such awnings as property holders might deem proper, convenient, and safe. Certain it is that no ordinance having direct reference to awnings was adopted until the year last named, when it was ordained that "all posts and rails fixed in any

street for the purpose of supporting any awning shall be round, turned posts, and shall be placed next to and along the inside of the curb-stone, and shall be twelve feet in height above the sidewalks, including the rail on top;" and "no portion or any part of any cloth or canvas used as an awning shall hang loosely down from the same over the sidewalk or foot-path." Again, in 1888, after the lapse of about 31 more years, another ordinance was adopted, in which it was declared that "all consents or permissions heretofore granted by the city council, or by the board of fire wardens," in respect to the erection of awnings, be revoked; and "no person or persons shall build or erect any hanging sign or signs, awning or awnings, on the streets of this city without first obtaining permission from the streets and drains committee of council and the board of fire wardens conjointly, which permission may be revoked at the pleasure of council." Notwithstanding this last ordinance, it does not appear that any action looking to the removal of existing awnings was taken by the city authorities until the 28th of February, 1893, when council adopted a resolution in these words: "Resolved, that all wooden awnings in the city, i. e. over streets or sidewalks, be taken down within sixty days, at the expense of the owners." The petition in the present case was brought to restrain the municipal authorities from executing this resolution, which is in the nature of an ordinance. The injunction prayed for was granted, and the city council accepted.

Petitioners, among other things, alleged that the awnings in question were erected, at considerable expense, with the full knowledge and consent of the city authorities; "that the last erected awning of petitioners was put up more than nine years ago, and most of them have been where they now are for more than twenty years, except that when new material was inserted therein to strengthen an old awning or rebuild;" that these awnings are in good order and repair, and are of such kind as have customarily been constructed, and allowed by the city to exist, time out of mind, and that they offer no obstruction to the full and free enjoyment of the streets and sidewalks. The contention of petitioners, therefore, is that it would be inequitable, unjust, and oppressive for council now to be allowed to capriciously revoke the license conferred, and, irrespective of any necessity for so doing, to summarily destroy their property, without compensation, and without even notice to them, or an opportunity to be heard upon the question of removing their awnings. The defendant, though not conceding that the awnings of petitioners were erected, or have been allowed to remain, under its express permission, replies that, even if licenses were granted, they could be revoked at pleasure, and that, in the exercise of the

police powers with which the municipal authorities are vested, the awnings could be removed summarily without notice to the owners. It is quite certain from the record that, if the awnings involved in this controversy have any rightful existence, it can be accounted for only on the assumption that they were erected under license, either express or implied, from the city government, and, no matter how long they have existed, their continuance must be referred to the original license, or to a renewal or repetition of the same. The question, therefore, is, can the doctrine of estoppel, under these circumstances, be invoked to prevent the city authorities from removing encroachments which, undoubtedly, as an original question, they had full power to prevent? or, in other words, is the license to erect and maintain these awnings perpetual and irrevocable? In answer to this question, we will, in the first place, remark that no express legislative authority has ever been conferred upon the city government to grant the right to erect and perpetually maintain awnings over the sidewalks of the city, and, this being so, that such authority has never existed. The municipal government of Augusta, irrespective of the special act of 1814, has, we presume, as the authorities of most cities have, the power to regulate and control the streets and sidewalks. Beyond question, the city council of Augusta has, by virtue of that special act, an express and clear legislative right to remove obstructions and encroachments on the streets. This right was wisely conferred for the benefit of the public, to whom the streets and sidewalks really belong, and the city council cannot, in the absence of clear and unequivocal authority from the legislature, perpetually deprive itself of this right by ordinance, contract, or otherwise. Public policy forbids that a city government should be allowed to part with any of its powers the exercise of which may be necessary to secure and conserve the public welfare; and any violation of this policy necessarily tends to an impairment of the usefulness and efficiency of the city government, and consequently to defeat, in a greater or a less degree, the very purposes for which it was created. In the absence of a clear grant of power from the legislature, the municipal authorities can do nothing amounting, in effect, to the alienation of a substantial right of the public. In a case like that of *Laing v. City of Americus*, 86 Ga. 756, 13 S. E. 107, the applicability of the doctrine here announced is clear enough, because there the obstruction placed upon the sidewalk was, without doubt, a nuisance per se; but, for the purposes of the present case, it makes no difference whether an awning is a nuisance per se or not. In *Hawkins v. Sanders*, 45 Mich. 491, 8 N. W. 98, it was held that a wooden awning over a sidewalk, in front of a store, was not. There can, however, be no doubt that an awning of any

kind, extending over a sidewalk, and supported by posts, is an encroachment, and to some extent, at least, an obstruction; and it has been shown, we think, that the municipal government of Augusta has never had any authority to grant permission to any of its citizens to erect and maintain in perpetuity any such encroachment or obstruction in that city. It is equally true, we think, that no lapse of time could render valid, so as to become irrevocable, a license which the city never had the power to grant in perpetuity. Although, in *Tennessee v. Virgin*, 36 Ga. 388, this court held that as to actions against a citizen the latter could, under the act of 1856 (Code, § 2925a), plead the statute of limitations, and that in Georgia the maxim of "nullum tempus occurrit regi" had been abrogated, we are quite certain that no statute of limitations or prescription of any kind could so operate as to abridge in any manner the exercise of the legitimate legislative powers of the state conferred by the people for the common welfare of all. In this sense, at least, the kindred maxim "nullum tempus occurrit reipublice" is still of force, and it is applicable to a city council, so far as its legislative powers conferred upon it by statute are concerned, as well as to the state itself, the city government being, in this respect, a part of the lawmaking power of the commonwealth. In this country the people are the rulers,—the source of all power,—and it cannot be sound doctrine that their servants in any lawmaking department can, by the lapse of time, any more than by their own action, be deprived of powers the exercise of which is essential or necessary to the proper performance of their duties and obligations to the public.

2. Having shown that licenses granted by the city council of Augusta to erect awnings, whether such licenses were express or implied, could not for any reason be irrevocable, we will now state and briefly discuss another principle applicable to the facts of the present case. We think that where citizens of Augusta, with the permission of the city authorities, erected awnings, which, of course, involved expense, there would be an equitable estoppel against a needless or capricious revocation of the permission until after the lapse of sufficient time to allow the parties incurring the expense to realize, in the use and enjoyment of their awnings, a fair return for their outlay. Whatever may be the law in other jurisdictions, it is now well settled in Georgia that, as between private persons, a parol license, though primarily revocable, is not so when the licensee has executed it, and in so doing has incurred expense. This doctrine was announced as far back as 3 Ga. 82, in *Sheffield v. Collier*, and again in *Mayor, etc., v. Franklin*, 12 Ga. 239, in which Judge Nisbet said: "The rule is, as stated, that a parol license is revocable; but it has some exceptions. If the enjoyment of

it must be preceded necessarily by the expenditure of money, and the grantee has made improvements or invested capital in consequence of it, it becomes an agreement for a valuable consideration, and he a purchaser for value." Pages 242, 243. See, also, *Winham v. McGuire*, 51 Ga. 578, and *Railroad Co. v. Mitchell*, 69 Ga. 114. There are other cases decided by this court to the same effect, but the above will suffice. The quotation from Judge Nisbet's opinion is followed by these words: "In such cases the books say it would be against all conscience to permit the grantor to recall the license as soon as the benefit expected from the expenditure is beginning to be derived." The spirit of the principle thus announced is, within the limits indicated, applicable to the case before us. The city council could subserve no interest of the public by allowing awnings to be erected, and then, immediately, without reason, and in mere caprice or wantonness,—if such a thing be conceivable,—requiring them to be removed. Such a course would be harsh and unjust, without excuse, and unnecessary. This would be true even under the ordinance of 1888, in which the city council expressly reserved the right to revoke at pleasure any permission which might be given for the erection of awnings. This reservation would not confer upon the city authorities any right by granting a citizen permission to erect an awning, to mislead him into the belief that he would be allowed to enjoy it for at least a reasonable time, and then wantonly force him to destroy a structure, to erect which he had, on the faith of this belief, incurred expense. It is also established and sound law, however, that a verbal license, even when fully executed, is not necessarily forever irrevocable. In *Wingard v. Tift*, 24 Ga. 179, it was held that a verbal license to erect a dam and fish traps was not a license to renew the same after they had been washed away by high water. In that case, Judge Benning said (on page 182): "There is no dispute that such a license is revocable if its revocation does no damage to the person to whom it has been granted. Therefore, if Tift had chosen to revoke this license before the first dam and traps had been put in, he might have done so. In that case the license would not have been the means of putting Wingard and Floyd to any expense. So, Tift might revoke the license at any time after the dam and traps had been swept away, for then things would stand just as they stood in the beginning." Following this doctrine, and remembering, for the reasons already given, that the city authorities are not to be held as strictly to the terms of licenses granted by them as private persons would be, we are satisfied that persons who have been allowed to reap substantially the benefits of the mon-

ey they have expended in putting up awnings can have no cause of complaint that the city thereafter revokes the permission given to erect them. After they have enjoyed this benefit, we see no reason why, under the broad powers conferred by the act of 1814, the city government, in pursuit of a policy to have all awnings in the city constructed of such materials and in such style as is deemed proper and suitable under existing conditions, having reference to the convenience of the public, the sightliness of the streets, and other proper and reasonable considerations, may not cause to be removed old awnings, which had already been permitted to stand for many years. When the time has arrived when the city may fairly and in good faith revoke existing licenses to maintain these structures, the municipal authorities may have them removed as encroachments upon the streets, no longer authorized; and if the owners, after reasonable and fair notice, fail or refuse to remove them, the city may have them removed at their expense.

We again call attention to the fact that, as to the awnings involved in this controversy, the petition alleges that the one last erected was put up more than 9 years ago, and that most of them have been in existence for more than 20 years. It is not stated that any particular awning was rebuilt. In the absence of evidence to the contrary, we think it a fair presumption that those who erected the awnings have been fully compensated, by the use and enjoyment of the same, for all expenditures made upon the faith of the permission or license obtained from the city. Therefore a resolution or ordinance revoking the license is *prima facie* valid, and consequently its enforcement should not be enjoined.

We have not overlooked the fact that in one of the affidavits presented in support of the petition, and sworn to by a number of affiants, the following loose and general statement occurs: "The awnings of deponents have been where they now are (except when replaced by new material, for the purpose of repair and reconstruction) for a period of from two to twenty-five years." It is obvious, however, that petitioners are entitled to no relief greater than would be authorized by the allegations of their petition; and, besides, a mere general averment in the affidavit to the effect that some of the awnings have been erected for only two years, without specifying how many, where they were situated, or to whom they belonged, would not authorize the court to restrain the city authorities generally from enforcing the ordinance; the gravamen of the petition being that the injunction was sought in order to protect awnings, the most recently erected of which had been in existence for at least nine years. Judgment reversed.

INHABITANTS OF CITY OF TRENTON v.
TRENTON PASS. RY. CO.

(27 Atl. 483.)

Court of Chancery of New Jersey. Sept. 14,
1893.

Bill by the inhabitants of the city of Trenton to enjoin the Trenton Passenger Railway Company, Consolidated, from rebuilding its roadway. Injunction granted.

Edwin Robert Walker, for complainants.
James Buchanan, for defendant.

BIRD, V. C. Whatever else may be within the scope and prayer of this bill, the only question that I am called upon to consider and shall consider at this time is whether the defendant should be enjoined from further prosecuting the work of rebuilding or reconstructing its roadbed on a portion of East State street, in the city of Trenton, or not. I say "rebuilding or reconstructing," because I thought it may be, although I do not say it is, important to preserve, in the interests of the parties concerned, the well-known distinction between rebuilding or reconstructing and repairing. In my judgment, the case made by the defendant itself exhibits in the amplest manner the work of rebuilding or reconstructing, as distinguished from repairing. The proof shows that the work is not taking out here and there a tie or a crosspiece or a rail, inserting new ones, but the complete or entire removal of the structure which has formerly been used as a roadbed, and putting in place thereof wholly new and different, and in some respects improved, material. One or more expert witnesses of the defendant say that they very carefully examined the old roadbed and the materials in use, and say, in effect, that they found them so worn out and dilapidated that they were wholly beyond repair. The conclusion, then, must most certainly be, that the work in which the defendant has been engaged, and which it proposes to continue, is nothing less than a rebuilding or reconstruction of its track or roadbed.

The complainants insist that this work has been carried on without the permission of the board of public works,—that branch of the city authorities which, it is admitted, has the control or right to give directions in such matters. There is perhaps no question as to the right or power of this branch of the municipal authority to give directions as to the manner in which this work shall be done, and to superintend the work as it is being done. The defendant, by its conduct, admits the truth of this insistent. Before commencing the removal of the old roadbed, its president met one of the members of the board of public works, and informed him that the defendant company intended to begin and carry on this work. The defendant insists that he obtained the per-

mission of this member of the board of public works, and that it was only after he obtained such permission that the company commenced the work of rebuilding. This insistent upon the part of the defendant is so controverted by the bill and affidavits that I feel fully justified in coming to the conclusion that the defendant's resistance on this ground must fail.

I have said that, as I understand the argument of counsel for the defendant, it is conceded that, under the charter of the city of Trenton, the municipal authorities have control of the streets, highways, and alleys, so far as to give directions as to the time when, and the manner in which, work or improvement or change thereon or repair thereof is to be done. The legislature, in creating such power, declared that "the common council shall have power within the said city to make, establish, publish, and modify, amend, or repeal ordinances, rules, regulations, and by-laws to prescribe the manner in which corporations or persons shall exercise any privilege granted to them in the use of any street, avenue, highway, or alley in said city, or in the digging up of any street, avenue, highway, or alley for the purpose of laying down pipes, or any other purpose whatever, and to prohibit and prevent any such use or work at such times and seasons of the year as they may designate." In my judgment, this is so comprehensive as to include the work of the defendant, which, it is admitted, is so extensive in its nature as to almost entirely obstruct the use of said street, at the place of its operation, for any ordinary purposes of travel whatever.

I do not understand that there is any dispute as to the claim of the complainants that the board of public works of the city has succeeded to all the rights, powers, and duties which were conferred upon the common council by the act aforesaid. This law is so reasonable and so essential to the welfare of the city and all its business interests that it not only meets with universal approval, but it is conceded on every hand that without it conflicting interests would be so great and constant as to provoke unceasing turmoil, discord, and litigation. Every one, whether corporations or individuals, who has any rights in the streets, would be asserting his rights to preference. The defendant company most wisely or prudently yields to this, and, as I understand the case, supposed it was acting within the requirements of the charter when it gave notice to a member of the board of public works of its intention to commence and carry on the work of rebuilding. It doubtless supposed it had gone far enough to comply with the requirements of the law. But in this respect, so far as I am able to judge, it was mistaken. It did not have the authority which the law determines to be necessary before it undertook the work. It is there-

fore my duty to advise that the order to show cause be made absolute, restraining the defendant from further prosecuting the work referred to in the bill of complaint | until it shall have made application to the proper authorities, and obtained such directions respecting the carrying on of the work as the city authorities have a right to make.

CITY OF ST. PAUL v. CHICAGO, M. & ST.
P. RY. CO.

(65 N. W. 649, 63 Minn. 330.)

Supreme Court of Minnesota. Jan. 7, 1896.

On rehearing. Affirmed.

For former opinion, see 63 N. W. 267.

MITCHELL, J. This appeal has once before been considered by this court. 63 N. W. 267. The record and briefs were very voluminous, and the main issue was whether the defendant had acquired absolute title to the premises in controversy by adverse possession. The oral arguments were wholly, and the briefs mainly, devoted to a discussion of that question. The natural result was that other and less important issues received but little attention from either court or counsel. The defendant's claim of certain rights under City Ordinance No. 286 was disposed of in our opinion by merely saying that the ordinance amounted to nothing more than a revocable license; that its language was that of a license or permit, and not of grant. Upon an application for a reargument of this question, we became satisfied that sufficient consideration had not been given to it, and that there was at least grave doubt whether the ordinance, if valid, did not constitute an irrevocable contract between the city and defendant. We therefore ordered a reargument of the question as to the force and effect of this ordinance, and the rights of the defendant under it. This involves two questions: First, the authority of the city council of St. Paul to pass the ordinance; and, second, if they had the power to pass it, its force and effect. These questions should be considered in the order named; for, if the ordinance is held invalid, it will be unnecessary to consider the second question at all.

The land in question fronts on the Mississippi river, and was dedicated by the original proprietor to public use as a "levee." Defendant's grantor, being in possession of the premises and claiming adversely to the city, had erected thereon a wooden freight house, fronting on the river, and some 400 or 450 feet long. In 1881, after defendant took possession, it presented a petition to the common council of the city of St. Paul, stating that it contemplated taking down this freight house, and replacing it with a large and permanent one, and asking permission in the meantime to erect a temporary wooden structure. This permit was granted, the limit of the permit being two years. In March, 1882, the defendant presented a further petition to the common council, stating that it was then ready to construct its new freight house, which was described as to be a large, elegant, and permanent structure, plans of which were submitted. The petition further stated that, in order to carry out the plan of the structure as demanded by the growing

commerce of the city, it would be necessary to extend the river front of the building out into the river from seven to ten feet further than the front of the old one; and requested the council to approve the plan of the proposed building, and to grant permission to extend it out into the river to the limit above mentioned. The plan proposed was of a building about 600 feet long and 50 feet wide, of brick, with stone foundation and a slate roof. In response to this petition the council, in April, 1882, by a unanimous vote, passed the ordinance in question (No. 286), which is as follows:

"Section 1. That permission be, and the same is hereby given to the Chicago, Milwaukee & St. Paul Railway Company to take down and remove the old freight-house, which is owned and used by said company, standing next below Sibley street on the levee, and to erect a new freight building upon the site now occupied by said old freight-house, provided that the new structure may be extended a distance of ten feet nearer the Mississippi river than the old one, if the city engineer shall be of the opinion that the same shall in no manner interfere with the navigation of said river. And provided further, that said new freight-house shall be built substantially in accordance with the plans on file in the office of the city clerk. And provided that the basement or lower story fronting on the river shall be laid with substantial floor, and said lower story, together with the platform on the river front, and the railway track along the said river front shall be open and subject to the use of the public for all wharfage and transfer purposes without charge, and a sufficient platform and entrance for drays shall be provided for said lower story at the end of said building.

"Sec. 2. Nothing in this ordinance contained shall be construed as waiving any of the rights of the city of St. Paul in and to the real property proposed to be occupied by said building.

"Sec. 3. This ordinance shall be in force from and after its passage."

Thereupon the defendant proceeded and erected, and has ever since maintained, the freight house, in accordance with the provisions of the ordinance.

It may be here suggested that the authority of defendant's grantor, the St. Paul, Minneapolis & Manitoba Ry. Co., under its charter (Laws 1857, Ex. Sess., c. 1), "to construct its railroad upon and along, across or over any public or private highway," etc., "if the same shall be necessary," does not extend to or contemplate the construction upon a highway of stations, depots, freight houses, or other buildings, but applies only to railroad tracks, where the use of the highway by the railroad company will be concurrent with that of the general public, and not exclusive. *Village of Wayzata v. Great Northern Ry. Co.*, 50 Minn. 428, 52 N. W. 913. It is elementary law that a municipal corporation

has no proprietary rights in the streets, levees, or other public grounds within its limits. Whatever rights it has it holds merely in trust for the public. It is equally elementary that all its powers over such public grounds are derived from the legislature. It can exercise no power over them, except such as is given it by the legislature, either expressly or by necessary implication. It is also well settled that a grant of power to a city to grant any privileges or rights in streets or other public grounds is to be strictly construed, and not enlarged by construction; and, if there is a fair or reasonable doubt as to the existence of its power, it will be resolved against the municipality. Dill. Mun. Corp. § 705; *City of St. Louis v. Bell Tel. Co.*, 96 Mo. 623.

With these general principles in mind, we come to the consideration of the provisions of the charter of the city of St. Paul relating to the powers of the city council over public grounds within its limits, and which were in force in 1882, when Ordinance No. 286 was passed. The charter then in force was Sp. Laws 1874, c. 1, and amendments. Subchapter 4, § 7, of that act, provided that "the common council shall have the care, supervision and control of all public highways, bridges, streets, alleys, public squares and grounds, and parks and sewers, and all other public improvements and public property within the limits of said city." The able counsel for the defendant seems to rely with confidence on this as giving authority to the common council to pass the ordinance in question. He says: "Statutory provisions of this kind have uniformly been held to confer upon city councils authority to grant the railway companies the right to occupy public streets; at least, as against the city and the public." We have examined all the authorities cited by counsel, and submit, with all deference to him, that none of them support his contention. Some of these cases merely hold that a certain use of a street, as by erecting telephone poles and wires, or constructing a horse railroad, is a proper "street use," and imposes no additional servitude on the street; while others are merely to the effect that, under a general grant of power to regulate the use of streets, the city council has the power to prescribe the manner in which, or the conditions upon which, streets may be occupied for a legitimate "street use." In *Gregsten v. City of Chicago*, 145 Ill. 451, 34 N. E. 426, the city had an express grant of authority to do what it did. In *St. Louis v. W. U. Tel. Co.*, 149 U. S. 465, 13 Sup. Ct. 990, the only thing decided was that the city was authorized by the constitution and laws of Missouri to impose upon a telegraph company putting its poles in the streets of the city a charge in the nature of rental for the use of the streets for that purpose. Neither party was in position to question the authority of the city to permit the company to place its poles in the streets, for it was by virtue of the exercise of

this power that the city claimed the right to make the charge, and the permit granted by the city in the exercise of this assumed power constituted the only right on part of the company to put its poles in the street. We are of the opinion that the "care, supervision, and control" of streets and public grounds, and the power to regulate their use, which is the usual and ordinary grant of power to municipal corporations, and which is certainly as broad as the power granted by the section above quoted, is not sufficient to empower them to authorize the use of such grounds for the purpose even of constructing and operating thereon a commercial railway, much less of erecting thereon depots, freight houses, or other buildings which exclude the general public from the concurrent use of a part of the street or other public ground. Dill. Mun. Corp. § 705, and cases cited; *Lackland v. Railway Co.*, 31 Mo. 180. In this state these would not be proper "street uses," but the imposition of an additional servitude upon the street. Section 8 of the same subchapter of the city charter gives the common council power to vacate and discontinue public grounds, etc., upon certain conditions, but it will not be claimed that this section has any application to the case in hand.

The only other provision relating to the power of the common council in the premises is section 11 of the same subchapter, which reads as follows: "The common council shall have power and authority by a vote of three fourths of all the members elect of said council to grant the right of way upon, over and through any of the public streets, highways, alleys, public grounds or levees of said city to any steam railway or horse railway company or corporation upon such limitations or conditions as they may prescribe by ordinance." We may consider this in connection with Gen. St. 1878, c. 34, § 47 (Gen. St. 1894, § 2642), cited by counsel for defendant, and which reads as follows: "If it became necessary in the location of any part of a railroad to occupy any road, street, alley or public way or any part thereof, it shall be competent for the municipal or other corporation or public officer or public authorities owning or having charge thereof, and the railroad company to agree upon the manner and upon the terms and conditions upon which the same may be used or occupied; or such company may appropriate so much of the same as may be necessary for the purposes of said road in the same manner and upon the same terms as is herein provided for the appropriation of the property of individuals." Section 11 of the chapter quoted above clearly refers only to "trackage"; that is, to the right to construct and operate railroad tracks on the streets or other public grounds. This is conclusively shown by the term "right of way." It does not give the common council any authority to barter away, or transfer to a railroad company, the right to use any part of the streets or public grounds as a site for de-

pots or freight houses, to the entire exclusion of the public therefrom. This seems to us too plain to require argument. It also seems to us that the provision of the General Statutes cited is subject to the same limitation. The phrase, "in the location of any part of a railroad," clearly indicates to our minds that this also refers only to "trackage," and that it is but the counterpart and equivalent of section 11 of the city charter. It was never intended to authorize municipal authorities to sell or give away to railroad companies, as sites for depots and other buildings, lands in which they had no proprietary interest, and which they held merely as trustees for the public. Any such power would be an exceedingly dangerous one to vest in municipal authorities, and it would require very clear language to that effect to warrant a court in holding that the legislature intended to grant them any such power. Whether the authority of railway corporations to acquire rights in streets and other public lands by the exercise of the right of eminent domain is limited to "trackage" or "right of way," it is not necessary now to consider. If there is any other provision of statute containing any grant of power to the common council of St. Paul over public grounds within its limits, our attention has not been called to it by counsel, neither have we found it. Nowhere do we find any grant of power authorizing the common council to give the defendant the right to use and occupy any part of the public levee as a site for its freight house. It follows that this ordinance is invalid because not within the granted powers of the common council.

We have not overlooked the difference between a "street" and a "levee." A street is designed exclusively for the purposes of travel and intercommunication. The word "levee," as used in the West and South, means a landing place for vessels, and for the delivery of merchandise to and from such vessels, and,

as incident to that, for the temporary storage of the merchandise. Hence, some things might be a proper use of a public levee which would constitute a misuser of a street. For example, the erection and maintenance of a warehouse as a place for the receipt and delivery and temporary storage of goods while in transit would probably be a proper use of a levee, provided it was open to the common use of all on the same terms. This would be in aid of and necessary to the main object for which a levee is designed. But this is a very different thing from giving to a particular person or corporation the right to occupy a levee as a site for its warehouse solely for its own business, and to the exclusion of the general public, as was attempted by the ordinance in question. The fact that the common council stipulated that a small part of the structure might be used by the public for wharfage and transfer purposes does not alter the case.

It can hardly be necessary to say that the fact that the defendant may have expended its money on the faith of this ordinance creates no equitable estoppel against the public, whose mere trustee the city is in prosecuting this suit. The defendant was bound to take notice of the extent of the powers of the common council from which it obtained the ordinance. The result is that the former decision is adhered to, although, as to the point now considered, upon a different ground.

(Jan. 20, 1896.)

It appearing from the petition of the defendant that its counsel overlooked and failed to call the attention of the court to Gen. St. 1894, § 2680, it is ordered that further argument be allowed, but only as to the force and effect of said section, the same to be submitted on printed briefs either on or before the last day of the present term, or on the first day of the next term of this court, at the election of counsel for the plaintiff.

CITY OF DETROIT v. FT. WAYNE & E.
RY. CO.

(51 N. W. 688, 90 Mich. 646.)

Supreme Court of Michigan. March 18, 1892.

Mandamus, on the relation of the city of Detroit, to the Fort Wayne & Elmwood Railway Company, to compel respondent to make alterations in its tracks. Writ granted.

John J. Speed, for relator. Edwin F. Conely, for respondent.

McGRATH, J. This is an application for mandamus to compel respondent, a street-railway company, to observe the order of the common council of the city of Detroit as to the removal of the projecting ends of the ties upon which its tracks are laid, on Champlain street, between Rivard and Randolph streets.

The petition sets forth that it has let a contract for the repavement of Champlain street, said pavement to rest upon a concrete foundation. That the tracks of said railway are laid upon wooden ties, which extend a distance of three and one-half inches into the street on each side beyond the line of its tracks. That upon these ties are placed stringers about eight inches square. That the stringers are kept in place by iron brackets, which are placed outside of the stringers, and fastened to both tie and stringer. That the ties are laid upon sand and are tamped with sand and gravel. That the other street railways in said city (except the road on Fort street east, which is a new road) construct their railways with a bracket which extends outside of the stringer only one inch, and the tie is cut off so it does not extend beyond the stringer more than that distance. The bracket of the Ft. Wayne & Elmwood Railway Company extends outside of the stringer a distance of about three inches. On the Fort Street East Railway, owned and operated by respondent, the bracket does not extend outside the stringer at all, and the stringers are tied together by an iron rod, and this is an appropriate and suitable method of construction, and one which is essential where concrete is used as a foundation for pavement. That, if the construction adopted by the Ft. Wayne & Elmwood Railway is maintained, the water passing through the cobble-stone pavement which is laid between the rails will pass down and settle under the ties, making the foundation soft, and the constant vibration of the ties and stringers caused by the cars passing over the rails will break the bond of the concrete, which is laid around and over the projecting ties, and injure or destroy the pavement above and about it. That at a session of the common council held on the 24th of November, 1891, said council adopted a resolution as follows: "Resolved, that the Fort Wayne & Elmwood Street-Railway Company be, and they are hereby, directed to cause to be removed so much of the railway ties of their

railroad on Champlain street, between Randolph and Rivard street, as are outside of the stringers on which their rails are placed, in order that the street may be paved with a concrete foundation; it being the judgment of this council and the board of public works that, if the ties are not removed, the passage of the cars will, by their vibration, injure the concrete. The city clerk will transmit a copy of this resolution to the Ft. Wayne & Elmwood Street-Railway Company." That the respondent, through its attorney, in a communication addressed to the common council, declined to comply with the direction of the council.

The respondent sets up that, in pursuance and under the authority of the ordinances set forth, the respondent constructed, in the summer of 1890, the portion of its street railway on Champlain street, between Randolph street and Mt. Elliott avenue, under the supervision of and in the manner approved by the then board of public works of the city of Detroit, and in every respect in full compliance with the terms and conditions and agreements of the ordinances above mentioned. That, during the year 1891, the common council directed the repaving of Champlain street from Randolph street to Rivard street with brick, on a sort of concrete foundation, similar to the pavement on Griswold street in front of the United States post-office, and at the crossing of the respondent's street railway on said street. During the same year the common council directed the paving of Champlain street from Elmwood avenue to Mt. Elliott avenue with like pavement. In preparing for such paving and repaving, the board of public works fixed a grade on Champlain street whereby the street was raised in some places, and lowered in others, thereby necessitating a change in the existing grade of the respondent's street railway. Thereupon the respondent was notified by the board of public works to change the grade of its street railway so as to conform to the grade established by said board. The respondent, in compliance with the demand of said board, proceeded to change the grade of its street railway on Champlain street, and on the portion to be repaved has all of the grade changed as and so far as ordered. In order to have a suitable and secure foundation, it is absolutely necessary that the stringers should be held firmly in place, without the possibility of spreading and with the least possibility of vibration. To accomplish this result or end, the stringer rests in strong iron brackets securely fastened to the ties below, thus making a solid foundation. The stability and solidity of the road depend almost, if not wholly, upon the strength and security with which the bracket is fastened to the tie below, and in practical experience it has been found necessary to have the end of the tie project beyond the outside of the stringer on which the rail is fastened sufficiently to admit of the fastening of the bracket to the tie

by means of a spike driven through the outside foot of the bracket; that other forms of brackets are in use in the city of Detroit; that its form of bracket is of an approved pattern on horse railways; that it is an essential part of the foundation, and, if the respondent is required to make the change demanded, it may be compelled to change the foundation of its street railway throughout the entire length, thereby subjecting it to great unnecessary expense and great inconvenience, if not irreparable loss and damage, in weakening the foundation of its railway, as the stringers cannot be properly braced in the manner above described, or by an equivalent bracket. The feet of the bracket are its lateral support, and are about nine inches below the surface, thus giving ample room for paving over them. The ends of the ties project beyond the toe of the bracket from two to four inches. The ties on the portion of the street railway in question are of the usual length, and are such as are in common use on street railways. So much of the tie as projects beyond the toe of the bracket the respondent has offered to saw off at its own expense, and on the portion of Champlain street newly paved this course has been pursued under an agreement between the board of public works and respondent. That the common council of the city of Detroit has never adopted an ordinance governing or regulating the matters in question, nor has it in any other manner established any uniform rule governing, regulating, or treating all persons affected alike. The respondent denies that the other street railways in the city of Detroit constructed their railways (with the exception of Fort street east) with a bracket which extends outside of the stringer only one inch. The fact is that all of the brackets above described are in use on the various street railways of the city. There is another form of bracket in use which has no projecting foot beyond the outside of the brace, but this form of bracket requires a spike through it midway between its two braces, or through the bottom and center of it, so to speak, which spike is completely covered up by the stringer when in position. The result of this is that, when a tie becomes decayed and should therefore be removed, that portion of the road and foundation has to be completely torn up in order to replace the tie, whereas, with the present bracket, it is only necessary to slide it along the stringer by tapping it, thus uncovering the tie and admitting of its removal without a serious disturbance of the foundation of the road. This bracket, however, is not nearly as good as any of the other brackets above described, and for a heavier track and a different motive power would be insufficient. The respondent denies that the concrete in the pavement before mentioned will be injured by the vibration of the ties as claimed, and that the danger thereof is imaginary. The respondent alleges and charges the truth to be that, if the pavement is

properly constructed, there will be no vibration from any such cause, and that the concrete will be entirely secure from disturbance in such manner. The respondent denies that, if the construction adopted by it is maintained, the water passing through the cobble-stone pavement will pass down to and settle under the ties, thereby making the foundation soft. The respondent therefore submits: (a) That the board of public works had no authority to order the respondent to make the changes demanded; (b) that the common council has no authority to make such demand; (c) that the resolution of the common council was without legal force; (d) that, if the common council has any authority in the premises, the same can be exerted only through an appropriate exercise of its legislative power by ordinance, and that such ordinance, if it can be lawfully adopted, must be reasonable and uniform.

The following are extracts from the ordinances granting to respondent its franchise, and governing its operation: "The track of said railway shall be laid of such rails as are now laid in Woodward avenue, and as shall least obstruct the free passage of vehicles or carriages over the same; and the upper surface of the rails shall be laid flush with the surface of the streets, and shall conform to the grades thereof as now established, or as they shall, from time to time, be established or altered; and, in case of grading, paving, or otherwise, if it be necessary to relay said rails, the same shall be done at the expense of the grantees; and in all streets, or parts of streets, which are not paved, the rails shall be laid in such manner as shall least interfere with the public travel thereon, and as shall be authorized and approved by the city engineer. It is hereby reserved to the common council of the city of Detroit the right to make such further rules, orders, or regulations as may, from time to time, be deemed necessary to protect the interest, safety, welfare, or accommodation of the public in relation to said railways. The rails of said street railway shall be laid on a foundation equal to that of Woodward avenue or any other first-class railroad. On and after the date upon which this ordinance shall take effect, whenever any of the streets through which the line of said railway is or may be laid shall be hereafter ordered to be paved, repaved, or repaired, said company shall furnish all material and bear the entire expense of excavating, grading, paving, repaving, and repairing that portion of the street which lies between the outer rails of their tracks, including the space between all double tracks and switches, the said company shall at all times keep the same clear and in good order and condition; but said company shall have the right, for the purpose of paving, repaving, or repairing said space, to use either cedar blocks or cobble-stone, or some other similar, durable, and proper material, such latter material to be subject to the approval of the common council, and all cobble-stones or other material now

constituting the roadway between the said tracks of the company shall belong to said company, while used for the purposes of paving, repaving, and repairing, in the place or places where such cobble-stones or other material are not or hereafter may be for the first time laid or placed."

The street-railway act provides (How. St. § 3554) that "the common council or other corporate authorities of the city or village, in which any street railway shall be located, may from time to time, by ordinance or otherwise, establish and prescribe such rules and regulations in regard to said railway as may be required for the grading, paving, and repairing the street, and the construction of sewers, drains, reservoirs, and crossings, and the laying of gas and water pipes upon, in, and along the streets traversed by such road, and to prevent obstructions thereon." Highways are under public authority. Municipalities are by statute made liable for damages resulting from their defective condition. As is said, "the right of public supervision and control of highways results from the power and duty of providing and preserving them." The charter of the city of Detroit commits the regulation, supervision, and control of its streets to the common council. It empowers the council to improve the same and to determine the nature and details of such improvement. It gives to the common council the power to control, prescribe, and regulate the manner in which the streets shall be used and enjoyed. These powers are held in trust for the public benefit. They cannot be surrendered or delegated to private parties. All franchises granted or contracts made with reference to the use of streets must be made, not only with due regard to their lawful and proper use by others, but subject to the exercise by the municipality of the powers referred to.

The permission given respondent to use this street is in subordination to the general power of the municipality over its streets. The city is not under obligation to conform its treatment of its streets to the construction of respondent's road-bed, but, on the contrary, respondent must conform the construction of its road-bed to such reasonable regulations as are made by the municipality in the reasonable exercise of its powers respecting the use, control, regulation, and improvement of its streets. Street railways occupy public streets subject to the use of such streets by the public, subject to such burdens as may be made necessary by reason of the improvement of such streets, and subject to such changes in the construction of road-beds as improved and changed conditions may demand. The statute referred to empowers the council to prescribe such rules and regulations regarding such railways as may be required for the grading and paving of the streets occupied by them. In the exercise of the power conferred by this statute, as well as the power conferred by the charter respecting the determination of the character of all improvements, the council has the un-

doubted authority to determine what is necessary or required, and whether any particular method of construction of respondent's roadway interferes with the durability or preservation of the proposed pavement, and to prescribe such reasonable and practicable changes in the mode of construction as, in their judgment, will preserve and protect the proposed improvement. In the recent case of *City of Philadelphia v. Railway Co.*, 22 Atl. 695, the supreme court of Pennsylvania says: "By whom is the necessity for repairing or repaving, etc., to be determined? Certainly not by the company itself, but by the municipal authorities. As a general rule, it is their special province to determine when repaving is needed, and how it shall be done, whether with the same kind of material as before, or with a different and better material. It was never intended to transfer the duty of determining these matters, or either of them, from the municipal authorities to any one else. The proposition that, because cobble-stone was the kind of pavement ordinarily in use when defendant company was chartered, it is, in no event, bound to repave with any other and more expensive kind of material, etc., is wholly untenable. It cannot be entertained for a moment. It was never contemplated that the railway company would continue to exist and perform its corporate functions in a cobble-stone age. It was called into being with the view of progress. The duties specified in its charter were imposed with reference to the changes and improved methods of street paving which experience might sanction as superior to, and more economical than, old methods. In other words, the company is bound to keep pace with the progress of the age, in which it continues to exercise its corporate functions. The city authorities have just as much right to require it to repave, at its own expense, with a new, better, and more expensive kind of pavement, as they have to cause other streets to be repaved, in like manner, at the public expense."

In the present case the common council and board of public works have determined that the vibration of the projecting ties, which are laid upon a sand foundation, will break the bond of the concrete if laid over and around the projecting ends of the ties, which it must be if the projecting ties are allowed to remain, and thus the pavement will be destroyed. This conclusion does not appear to be unreasonable, but, on the contrary, the result which the council desires to protect the pavement against would seem to be most natural. The demand of the council necessitates the adoption, upon this section of respondent's road, of some other form of bracket or mode of staying the stringers. It is conceded that other brackets are used in the same city, and other methods are employed, which obviate the difficulty complained of. In view of this concession, the requirement of the common council is not an unreasonable one.

The objection that this demand has not been

made of all roads, and that it is made by resolution, instead of by ordinance, is untenable. The fact that it is made of respondent as to 2,400 feet of its road, and not as to its entire length of 15 miles, is a sufficient reason why it should rest in resolution, rather than in ordinance. The requirement is unnecessary when the street occupied is not paved, and may not be necessary as to all kinds of pavement. At all events, the record shows that the changed construction is not insisted upon where certain kinds of pavement are to be laid.

An ordinance could but define the power of the council, or empower the board of public works to make the requirement. The objection that compliance therewith involves large expense to respondent cannot avail. The statute imposes the duty of observance of such regulations as may be prescribed by the council, and the burdensome character of that duty does not affect the obligation to perform it. The writ must issue as prayed, with costs to relator.

The other justices concurred.

DAVIS v. EAST TENNESSEE, V. & G.
RY. CO.

(13 S. E. 567, 87 Ga. 605.)

Supreme Court of Georgia. July 13, 1891.

Error from superior court, Bibb county;
A. L. Miller, Judge.

Action by Ellen Davis against the East Tennessee, Virginia & Georgia Railway Company to recover damages. Judgment for defendant. Plaintiff brings error. Reversed.

Gustin, Guerry & Hall, for plaintiff in error. Bacon & Rutherford, for defendant in error.

BLECKLEY, C. J. 1. The Macon & Brunswick Railroad, extending from Macon to Brunswick, was the property of the state. By virtue of certain acts passed in 1879 it was first leased and then sold to a company which one of these acts incorporated by the name of the "Macon & Brunswick Railroad Company." See Acts 1878-79, pp. 115-122. The twelfth section of that act contains these clauses: That the lessee company which the act provides for "shall have full power and authority to survey, lay out, construct, equip, use, and enjoy a railroad from the city of Macon to the city of Atlanta," and divers others; "and shall further have power and authority to connect said roads, or either of them, at each terminus, with the roads of other companies constructed to said terminus, or which may hereafter be constructed to the said terminus." The thirteenth section requires the company or the lessees to "proceed, within one year or less time after the date of the execution of said lease, to build and put in good running order a railroad of five-foot gauge, or the same gauge with the Macon & Brunswick Railroad, between the city of Macon, in the county of Bibb, and the city of Atlanta, in the county of Fulton, and finish the same within five years from the execution of said lease; with the right to unite their tracks with the tracks of the roads now built or that may hereafter be built into said cities, by which cars may be transferred, without breaking bulk or detention, from road to road, at said cities." The evidence in the record indicates that the railroad from Macon to Atlanta was constructed by the Macon & Brunswick Railroad Company under and by virtue of these statutory provisions, and that, with the consent of the municipal government of the city of Macon, a part of the line was located and constructed along Wharf street, one of the public streets of the city. This occupation of the street was in pursuance of a contract between the company and the city authorities, by which the company agreed to pay to the city \$2,000 per annum for the privilege; and this payment has been regularly made from year to year. The main line along the street had already been constructed and was in use when the plaintiff, Mrs. Davis, in 1884, pur-

chased two city lots abutting on the street. These lots she improved by erecting upon them a dwelling house and a blacksmith, carriage, and paint shop, afterwards used for carrying on a carriage and wagon manufacturing and repairing business. The evidence indicates that, after the plaintiff purchased, and her occupancy commenced, the main track was removed from its original position, and placed several feet nearer to her property; and also that a second side track was constructed in front of her premises. The defendant is the successor of the Macon & Brunswick Railroad Company, and has all its rights and privileges, including the right, if any, to occupy and use the street in question as a location for its line of railway. The first question is whether its occupation of this street is lawful or unlawful. It was settled by the decision of this court in the case of *Daly v. Railroad Co.*, 80 Ga. 793, 7 S. E. 146, that power to authorize the public streets of the city of Macon to be occupied and used as the route of a steam railway resides exclusively in the legislature of the state, and that the municipal government is without authority to grant such a privilege to a railway company. No express grant by the legislature to the defendant or to any of its predecessors has been produced. The Code declares in-section 719: "Public highways, bridges, or ferries cannot be appropriated to railroads, plankroads, or any other species of road, unless express authority is granted by some constitutional provision of their charter." Highways, in the broad sense, include streets. *Elliott, Roads & St.* 1, 2, 12, 13; 1 *Abb. Law Dict.* 562; 1 *Bouv. Law Dict.* 750; 2 *Bouv. Law Dict.* 672; *And. Law Dict.* 981; 9 *Am. & Eng. Enc. Law*, 362. This section of the Code had its origin in the Code of 1863, and was of force when the above quoted legislation was enacted in 1879. Construing it as applying to streets as well as to public roads in the country, it would be decisive against any implied grant of authority to build a railroad along Wharf street in the city of Macon, however strong any implication of such authority might be. This court, in *Railroad Co. v. Mann*, 43 Ga. 200, appears to have treated the matter of the section as probably applying to the streets of a town; but, without ruling definitely on this question, we can rest our decision in the present case on the general doctrine that no authority not granted in express terms would exist unless it arose by necessary implication. "Though 'the grant of land for one public use must yield to that of another more urgent,' and though 'every grant of power is intended to be efficacious and beneficial, and to accomplish its declared object, and carries with it such incidental powers as are requisite to its exercise,' yet 'when it is the intention of the legislature to grant a power to take land already appropriated to another public use, such intention must be

shown by express words, or by necessary implication.' Therefore the mere grant of a charter right to build a railroad between two points does not carry with it, by necessary implication, the right to occupy longitudinally a highway lying in the general route contemplated, unless the topography of the ground be such (as, for instance, the notch of the White mountains) as to physically preclude a location, by reasonable intentment, to have been designed on any other line." *Ror. R. R. 502*. See, also, *Daly v. Railroad Co.*, *supra*. Nothing appears on the face of the legislation itself, nor from any evidence in the record before us, tending to show that it would be necessary to use any public street in order to construct a railroad from the city of Macon to the city of Atlanta; or to connect it with any other road at Macon, including the road from Macon to Brunswick; or to unite its tracks with that and other roads terminating in said city, so that cars could be transferred from road to road, without detention or breaking bulk. That to accomplish these objects some, and perhaps many, of the streets would have to be crossed, is a necessary implication; and the presence of that serves to furnish a good example of what a necessary implication is. Authority to run a railroad through a city involves in its terms the privilege of crossing the streets, but not of occupying them longitudinally. The act of 1850 conferred upon the Central Railroad and the Macon & Western Railroad authority to unite their tracks in one common depot within the city of Macon; but, as construed by this court in *Daly's Case*, *supra*, the act did not by implication grant any right of using the public streets for the purpose. Indeed, nothing is more manifest than that, under ordinary conditions, roads may pass through cities and make connections, one line with another, without appropriating to themselves any of the streets used by the public. The only necessary encroachments upon the streets would be to cross and recross them; sometimes at one angle, and sometimes at another. When it is the intention of the legislature to allow steam railways to occupy or appropriate the public streets or highways, it is easy to say so; and where the intention is left the least doubtful, the doubt must be given in favor of the general public and against the railway corporation. There is always a strong presumption that public property, or property already devoted to public use, is intended to remain intact, and not be converted, in whole or in part, to another public use. *Mayor of Atlanta v. Railroad, etc., Co.*, 53 Ga. 120. The case of *Wood v. Railroad Co.*, 68 Ga. 539, involved no question as to the appropriation of highways or streets. It concerned the location of the railway along the river bank, through a plat of ground to which the city had title, and which the city, not the state, had dedicated to public use as

a cemetery. The ruling of this court was that the city, without express authority from the legislature, could devote a part of the ground not actually used for burial, nor adapted to that use, to another public purpose, to wit, the location of the track and road-way of this railroad. The court also held, in effect, that, construing the legislation which we have quoted above in the light of the special facts disclosed in the record of that case, that legislation conferred the requisite authority by necessary implication, so far as any authority was needed from the legislature. The title to the public streets of Macon is not in the city, but in the state; the state, not the city, has dedicated them to public use; and that part of Wharf street now in question was, it may be assumed, in actual use by the public as a highway both in 1879, when this legislation took place, and afterwards, when the city undertook to change the original dedication in part by consenting to the occupation of the street as the route of a steam railway. Had *Wood's Case* related to one of the streets of the city instead of to the river margin of the cemetery grounds, the decision would doubtless have been different. Indeed, it must have been different if streets are highways within the meaning and intent of section 719 of the Code. It follows from what we have said that the defendant must be treated as occupying Wharf street with its railway without legal authority; and, consequently, that the law of nuisance, and not the law of assessment for property taken or damaged by the exercise of the right of eminent domain, applies between the parties in the present controversy.

2. The scope of the plaintiff's action embraces two classes of damage,—damage to the corpus or freehold, and damage by diminishing the annual value of the premises for use. The evidence shows very conclusively that the market value of the property was increased, rather than diminished, by the location and use of the railroad in the street. The plaintiff can recover nothing on that score, for the reason, if for no other, that she proved no damage of that class. But the evidence did tend to show that she had sustained damage by the diminished annual value of the premises for use in their present condition. The court, in its charge to the jury, seems not to have recognized this element as a basis for recovery. We think this was error. A wrong-doer cannot set off increase of market value, caused by his unlawful act, against loss of rents and profits occasioned thereby. *Marcey v. Fries*, 18 Kan. 353; *Francis v. Schoellkopf*, 53 N. Y. 153; *Gerrish v. Manufacturing Co.*, 30 N. H. 478. Injury to rental value is or may be separate and distinct from injury to market value. The measure of damages in an action for a nuisance affecting real estate is not simply the depreciation of the property. *Baltimore & P. R. Co. v. Fifth Baptist*

Church, 108 U. S. 317, 2 Sup. Ct. 719. The owner of property is entitled to use it in its present condition, and one who unlawfully hinders, obstructs, or interferes with such use, cannot appeal to the increased market value which might be realized if the property were devoted to other purposes, and take credit for such increase by way of indirect set-off against the direct loss or injury which he has occasioned. Nor would the purchase of the premises by the plaintiff after the road was located and constructed in the street be any reason why she might not recover damages of this class which she has actually sustained. *Glover v. Railroad Co.*, 51 N. Y. Super. Ct. 1; *Werfelman v. Railway Co.* (Com. Pl.) 11 N. Y. Supp. 66.

3. Under the declaration, as we construe it, there was no error in excluding evidence "that the means of ingress to and egress from the property of plaintiff by a street on which said property is situated had been, by the construction of the railroad of defendant in said street, interfered with at a point 200 feet, and that by reason of such interference the property of plaintiff had been damaged." This is a somewhat obscure statement of what was offered to be proved; but if it means what we suppose, namely, that ingress and egress were impeded by an obstruction 200 feet distant from the plaintiff's premises, the declaration seems to us not to cover it. The court erred in not granting a new trial. Judgment reversed.

GREEN v. EASTERN RY. CO. OF MINNESOTA.

(53 N. W. 808, 52 Minn. 79.)

Supreme Court of Minnesota. Dec. 27, 1892.

Appeal from district court, Anoka county; Cauty, Judge.

Action by James V. Green against the Eastern Railway Company of Minnesota for personal injuries. Judgment for plaintiff. Defendant appeals. Affirmed.

M. D. Grover, for appellant. E. H. Ammons, for respondent.

DICKINSON, J. At about half past 5 o'clock, or a little later, in the afternoon of the 17th of December, it having then become dark, the plaintiff, in an open buggy with a span of horses, drove north on Seventh avenue in the city of Anoka towards the track of the defendant, which crossed that street. As he approached the crossing to within about 25 or 30 feet of the railroad track a passenger train from the west ran over the crossing, frightening the horses so that they wheeled suddenly, throwing the plaintiff out of his buggy, causing injuries for which this action is brought. Liability on the part of the defendant is attributed to the failure to give any signal or warning of the approach of the train, including the neglect of the defendant to station a flagman at this crossing. As to the fact of the negligence of the defendant a case was presented which entitled the plaintiff to go to the jury. The evidence was conflicting as to whether any signal was given from the locomotive, and there was no flagman at the crossing. The evidence also tended to show that for a distance of about two blocks south of the crossing the plaintiff could not have seen an approaching train by reason of intervening buildings and a high fence. Such obstruction to the view on the west side of the street extended to within 36 feet of the center of the railroad track. The evidence, as returned, does not show very distinctly the opportunities of the plaintiff for seeing an approaching train while he was at a greater distance than two blocks from the crossing, although it is shown that at some places at least one could see between intervening buildings. The plaintiff's evidence was that he both looked and listened, walking his horses, but did not see or hear the train, or any signal, until the train dashed in front of his team. From the fact that there was no collision with the train, it does not follow that the neglect to ring the bell or to have a flagman at the crossing was immaterial. It cannot be assumed that, if signals of the approach of the train had been given, the plaintiff

would not have heard or seen them, and have stopped his horses (although he says they were "safe and true") at such a distance from the track that the passing train would not have greatly frightened them. An ordinance of the city, requiring railroad companies whose trains crossed this avenue to keep a flagman there to give signal of the approach of cars and locomotives, was received in evidence, the defendant objecting. The suggestion now made, that the ordinance is uncertain in its terms, requiring the presence of a flagman "at all necessary times of day and night," was not, we think, called in question by the objection stated at the trial, which seems to have been directed to the point that the charter of the city did not authorize the council to pass an ordinance upon this subject, and, further, perhaps, that the ordinance was unreasonable. It is apparent that the trial court so understood the objection, and was justified in so doing. It is expressly conceded on the part of the appellant that under the general powers conferred on the city council it had authority to make any reasonable regulation upon this subject, unless such general authority is to be deemed restricted by subdivision 3S, § 5, subc. 4, of the charter, (chapter 9, Sp. Laws 1889.) By that section the city council is expressly authorized to enact ordinances for the various purposes specified, among which is that above referred to, the thirty-eighth: "To regulate the speed of cars and locomotives within the limits of said city, and prevent the obstruction of any street * * * by any railroad car, locomotive, or train of cars." The general safety clause of the charter, (section 3 of the same subchapter,) which confessedly is sufficiently comprehensive to include authority to pass a proper ordinance upon the subject under consideration, confers such general authority "in addition to any other powers herein granted." It thus appears that it was not intended that the specific enumeration of subjects or cases in section 5 should comprehend all the cases or subjects to which the authority of the council should extend. Nor is the nature of the special provision relating to the speed of railway trains such, or so related to the subject of stationing flagmen at street crossings, that it is to be construed as restricting the general grant of power so that it shall not extend to the latter subject. While the two subjects relate to railroad operations, they are otherwise different and distinct. The case is distinguishable from that of State v. Hammond, 40 Minn. 43. 41 N. W. 243. Neither the assignments of error nor the exceptions raise the point that the court erred in submitting to the jury the question whether the ordinance was reasonable. Judgment affirmed.

BURGER v. MISSOURI PAC. R. CO.

(20 S. W. 439, 112 Mo. 238.)

Supreme Court of Missouri, Division No. 2.
Oct. 10, 1892.Appeal from circuit court, Moniteau county;
E. L. Edwards, Judge.

Action by Edgar Burger, by Thomas M. Burger, his next friend, against the Missouri Pacific Railroad Company, to recover damages for personal injuries resulting from the alleged negligence of defendant's employes. Judgment for plaintiff. Defendant appeals. Affirmed.

H. S. Priest and W. S. Shirk, for appellant.
Moore & Williams and Draffen & Williams, for respondent.

MACFARLANE, J. * * * * *

3. Defendant moved for a nonsuit at the close of all the evidence, upon two grounds: First, that the evidence did not show negligence on the part of defendant; and, second, that the evidence did show such contributory negligence on the part of plaintiff as should prevent his recovery. This motion was denied, and the ruling of the court in doing so is assigned as error. The facts, as disclosed by the evidence, and about which there is no real controversy, were, in substance, as follows: On the 3d day of May, 1889, plaintiff was 9 years and 10 months old, and was a bright, intelligent, and active boy. He lived with his parents a few blocks south and east of the railroad. The railroad runs through the town east and west, and Oak street, which was one of the principal streets of the town, ran north and south across the railroad. There were two side tracks and one main track across Oak street. The schoolhouse was on the north side of the railroad, and over Oak street was the usual route from the home of plaintiff to school. On said day, plaintiff, accompanied by his sister, 13 years of age, started to school, and traveled down Oak street, as usual, to the railroad, where they found a train of freight cars standing on one of the side tracks across the street. After waiting there some 15 minutes, and hearing, as he testified, the school bell ringing, plaintiff put his hands upon the cars, and his foot between the drawheads, and just as he went to go over the train came back together, and caught his foot between the drawheads. He stooped down and pulled out the coupling pin, and the rest of the train started up. Amputation of the foot was necessary. Plaintiff testified that a man crossed before him. He admitted that he had been told by his parents that it was dangerous to attempt to cross over trains, and warned not to do so. He knew about signals of whistling and ringing bells on engines, and that there was a street 300 feet west of this crossing on which he could have crossed the track, and by which he could have gone to school. The evidence

tended to prove that when the train moved back no signal was given. None of the men in charge of the train knew that plaintiff was at the time attempting to cross over it, or that he was about it, or in any wise in danger. The court admitted, over defendant's objection, the charter of the town, and an ordinance prohibiting the obstruction of streets by trains for more than 10 minutes at any one time. It will be seen that the evidence tends to prove the allegations of the petition which charge negligence of defendant. The petition being sufficient, as has been seen, and the evidence tending to prove its charges, a case was made for the determination of the jury as to the negligence of defendant. It is insisted that the act of plaintiff, having the intelligence, experience, knowledge, and general capacity he was shown by the evidence to possess, in placing himself on the coupling between two cars in a train, to which an engine was attached, was such contributory negligence as precluded a recovery. It must be conceded that, for a boy of his age, plaintiff was shown to possess unusual capacity. He was bright, intelligent, and active; had some knowledge of the movement of trains and the use of train signals; and admitted that he knew it was dangerous to undertake to pass through between cars in a train, and had been warned by his parents not to attempt to do so. It also appeared that another convenient and unobstructed route to school was open to him. It may also be conceded that the act of plaintiff, when measured by the standard applied to an adult person of ordinary prudence, was a negligent act. *Hudson v. Railway Co.*, 101 Mo. 13, 14 S. W. 15; *Corcoran v. Railway Co.*, 105 Mo. 399, 16 S. W. 411. It was said in *Spillane v. Railway Co.* (decided at this term) 20 S. W. 293, that "no arbitrary rule can be established fixing the age at which a child, without legal capacity for other purposes, may be declared wholly capable or incapable of understanding and avoiding dangers to be encountered upon railway tracks. It is a question of capacity in each case." Common experience and observation teach us that due care on the part of an infant does not require the judgment and thoughtfulness that would be expected of an adult person under the same circumstances. In the conduct of a boy, we expect to find impulsiveness, indiscretion, and disregard of danger, and his capacity is measured accordingly. A boy may have all the knowledge of an adult respecting the dangers which will attend a particular act, but at the same time he may not have the prudence, thoughtfulness, and discretion to avoid them which are possessed by the ordinarily prudent adult person. Hence the rule is believed to be recognized in all the courts of the country that a child is not negligent if he exercise that degree of care which, under like circumstances, would reasonably be expected of one of his years and capacity. Whether he used such care in a particular case is a question for the jury. *Beach, Contrib. Neg.* § 117; *Eswin v.*

1 Part of the opinion is omitted.

Railway Co., 96 Mo. 295, 9 S. W. 577; O'Flaherty v. Railway Co., 45 Mo. 70; Plumley v. Birge, 124 Mass. 57; Meibus v. Dodge, 38 Wis. 300; Railroad Co. v. Young, 81 Ga. 397, 7 S. E. 912.

4. Defendant insists that the ordinance of the city, limiting the time streets might be obstructed by trains to 10 minutes, was not authorized by any provision of the charter. We think ample authority was granted this city under its charter to authorize the council to pass the ordinance in question. The charter gave the city the right and control over the public streets, and the council power to

pass any ordinance "usual or necessary for the well-being of the inhabitants." The general grant of power to municipal corporations to pass ordinances or by-laws for the general welfare gives authority to pass by-laws, "reasonable in their character, upon all other matters (not authorized by special grant) within the scope of their municipal authority, and not repugnant to the constitution and general laws of the state." 1 Dill. Mun. Corp. §§ 315, 316.²

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² Part of the opinion is omitted.

CITY OF CHARITON v. FITZSIMMONS.

SAME v. FRAZIER et al.

(54 N. W. 146, 87 Iowa, 226.)

Supreme Court of Iowa. Jan. 24, 1893.

Appeals from district court, Lucas county; W. I. Babb, Judge.

The defendants were arrested upon warrants issued by the mayor of the plaintiff city upon informations charging them with violating an ordinance of the city. The defendants were taken before the mayor, and entered pleas of not guilty. A trial was had, and they were found guilty, and judgment was entered against each of them in the sum of \$10 and costs. They appealed to the district court, where, by agreement, the pleas of not guilty were withdrawn, and the defendants demurred to the informations. The demurrer was sustained, and the plaintiff city appeals.

W. B. Barger and T. M. Stuart, for appellant. J. C. Mitchell and Warren S. Dungan, for appellee.

ROTHROCK, J. The ordinance under which the arrests were made and trial had was, by agreement, made part of the record, and the demurrer was sustained upon the ground that the ordinance was invalid. The ordinance in question, so far as it pertains to the question involved, is as follows: "First. That the collection or congregation of persons upon the streets or sidewalks of the city, and the marching or movements of persons in crowds or processions thereon, at such times and places, and in such numbers and manner, as to obstruct or impede public travel thereon, or to injuriously affect or interfere with the business of any person or persons on such streets, is hereby prohibited; and it is hereby made the duty of the mayor and city marshal to order all such congregations or processions of persons to quietly disperse; and the failure or refusal of any person or persons to promptly obey such order of the mayor or city marshal shall be deemed a misdemeanor, and, upon conviction thereof, such person or persons shall be fined in any sum of not less than one dollar and not more than fifty dollars, in the discretion of the court, and shall be imprisoned in the county jail until such fines and costs of prosecution are paid. Second. That the making of any noise upon the streets or sidewalks of the city, by means of musical instruments or otherwise, of such character and extent, and at such times and places, as would likely cause horses and teams to become frightened and ungovernable, or of such character, extent, and duration as to annoy and disturb others, is hereby prohibited; and it is hereby made the duty of the mayor and city marshal to order any person or persons making such noise to desist therefrom, and the failure or refusal of such person or persons to promptly obey such order of the mayor or city marshal is hereby

declared to be a misdemeanor, and, upon conviction thereof, such person or persons shall be punished by a fine of not less than one dollar and not more than fifty dollars for each offense, in the discretion of the court, and shall be imprisoned in the county jail until such fines and costs of prosecution are paid." The grounds of demurrer are that this ordinance is unreasonable and unjust, and prescribes a penalty, not for the violation of an ordinance, but for the refusal to obey an order of the mayor or city marshal. It is important to first determine whether the acts sought to be prohibited by the ordinance are such as the city may punish by ordinance. We do not understand counsel to claim that collections and congregations of "persons upon the streets or sidewalks of a city, and the marching or movements of persons in crowds or processions thereon," may not, under certain circumstances and conditions, be prohibited. It is not the orderly procession, with flags and banners, musical instruments, and all the accompaniments, so often seen upon the streets of our cities and towns, by our civic societies, by political parties, and not infrequently at funerals, which this ordinance prohibits. These processions are everywhere not only permitted, but encouraged. But suppose these processions should for an unreasonable time obstruct travel on the streets, or injuriously affect business, and be carried on to such an extent and for such time as to be an annoyance and a nuisance to the public, there can be no question that the city may by ordinance prohibit them, and punish the persons making such an unreasonable disturbance. If the ordinance involved in this controversy were a sweeping prohibition of all processions, parades, and all riding and driving upon the public streets of the city with bands of music, flags, torches, and other paraphernalia of the modern street parade, there can be no doubt that the ordinance would be unreasonable, unjust, and invalid. Within proper limits, the city has the power to "prevent riots, noise, disturbance, or disorderly assemblages, * * * and to preserve peace and order therein." Code, § 456. We do not understand counsel for the defendants to question these general propositions. The real objection which they urge to the ordinance is that the offense is made to depend upon the whim or caprice of the mayor or city marshal. It is true that under the ordinance, when persons are arrested and brought for trial, it is incumbent on the prosecution to show by evidence that the order to desist from making the disturbance was given by the mayor or city marshal. But it is also incumbent on the prosecution to prove that the person or persons charged were guilty of doing the prohibited acts. This is the gravamen of the charge. Evidence that the order to desist was given, without more, would not authorize a conviction. We are aware of no case determined by a court of last resort which is exactly in point upon the question

under consideration. In *Re Frazee*, 63 Mich. 396, 30 N. W. Rep. 72, it was determined that an ordinance absolutely prohibiting street processions with musical instruments, banners, torches, etc., or while singing or shouting, without the consent of the mayor first obtained, was unreasonable, and therefore invalid. In that case the offense consisted in failing to obtain the consent of the mayor before the procession or performance began. In the case at bar persons are not prohibited from putting a procession in motion. The prohibition extends to such a display as causes a public annoyance. So in the case of *Mayor of Baltimore v. Radecke*, 49 Md. 217, it was held that an ordinance which provided that permits for steam boilers and engines might be revoked and removed after six months' notice from the mayor, and any one receiving such notice, who refused to comply therewith, should pay a fine, was held to be unreasonable. This was an unwarrantable and unreasonable interference with the prosecution of a legitimate business, and depended upon the mere caprice of the mayor. In the case at bar, as we have said, the offense consists in doing acts which are everywhere regarded as sub-

ject to municipal control. Other cases are cited by counsel, but it appears to us that they are clearly distinguishable from the case at bar. On the other hand, in the case of *Com. v. Davis*, 140 Mass. 485, 4 N. E. Rep. 577, an ordinance providing that "no persons shall, except by the permission of the said committee, deliver a sermon, lecture, address, or discourse on the common or public grounds," it was held that the ordinance was not unreasonable and invalid. The committee referred to in the ordinance was the committee of the city council having charge of the public grounds. See, also, *Com. v. Plaisted*, 148 Mass. 375, 19 N. E. Rep. 224. In our opinion, the ordinance in question is not unreasonable. It is applicable to all persons who, by violating its provisions, subject themselves to its penalties; and the mere fact that no arrest can be made unless the mayor or marshal shall order the offender to cease from violating the ordinance, instead of being oppressive on the citizen, operates as a warning to him to desist from a violation of the ordinances. He should not be heard to complain of this feature of the ordinance. The order of the district court sustaining the demurrer to the information is reversed.

WETTENGEL v. CITY OF DENVER.

(39 Pac. 343, 20 Colo. 552.)

Supreme Court of Colorado. Feb. 8, 1895.

Error to county court, Arapahoe county.

John Wettengel, convicted in a police court of the violation of a city ordinance, upon appeal to the county court was again convicted, and from the judgment therein brings error. Reversed.

J. Warner Mills, for plaintiff in error. F. A. Williams and A. B. Seaman, for defendant in error.

CAMPBELL, J. There are a number of errors assigned, the principal one of which is the invalidity of the ordinance. There are, however, two other questions which will be considered, the determination of which will work a reversal of this judgment; but, inasmuch as there are a number of cases pending in the court below which depend upon the decision in this, we have concluded to determine the main point involved, and pass upon the constitutionality of the ordinance.

The evidence tends to show that on the night of August 6, 1890, on Larimer street, in the city of Denver, between Eighteenth and Nineteenth streets, the defendant, with others, distributed to travelers on the street, whom he could induce to take the same, 600 or 700 circulars or handbills, about 7 by 10 inches in size, which gave the names of the 6 o'clock and Sunday closing houses in Denver dealing in ready-made clothing and boots and shoes, and urged the public to patronize them. At the same time the receivers of these circulars were requested not to drop them on the streets, and some of those to whom such requests were made complied therewith, but others dropped them on the street. The circulators endeavored to pick up such as were thrown away, but, notwithstanding this, some of these circulars were deposited on the street, and found there and on the sidewalks the following morning.

The validity of this ordinance is assailed on the ground that it is unreasonable. It is contended that it is an "attempt to regulate and restrain the conduct of the citizen in matters of mere indifference, without any good end in view"; that it aims to prohibit the carrying on of a business which in general, and in itself, is lawful. The legislature not having conferred upon the city the express authority to pass an ordinance prohibiting the distributing of circulars on the streets, the power, if it exist at all, must be derived from the general welfare clause, and the power given to prevent "practices having a tendency to frighten teams or horses." The reasonableness of this ordinance, therefore, is a matter for judicial determination. No useful purpose would be subserved by following counsel for plaintiff in error in his discussion of the competitive wage system, of the conflicting views of speculative phil-

osophers on sociology, or of the rights of employers and employes, all of which is not germane to the present discussion. The right of clerks to combine to secure, by all lawful means, shorter hours or higher wages, is unquestioned, and needs no argument to support it. Our hearty concurrence in all that is said by counsel in this part of the argument would not lead us to a decision of the propositions which are necessarily involved in the determination of this case. We proceed at once to a discussion of the main point, viz. the validity of the ordinance:

If the object of this ordinance is to prohibit the distributing to travelers on the street of any circular or handbill, irrespective of its character, it might be held unreasonable, and come within the principle announced in the case of *People v. Armstrong*, 73 Mich. 288, 41 N. W. 275. The section of the ordinance held unconstitutional in that case is, in substance, as follows: "No person shall himself, or by another, circulate, distribute or give away circulars, handbills or advertising cards of any description in or upon any of the public streets and alleys of said city." As the court in that case said, "the offense is made complete in itself by the mere act of distributing or giving away these enumerated articles." For that reason, among others, the ordinance was declared invalid. In the ordinance before this court such are not its provisions, but the prohibition applies only to the distributing of handbills or circulars of such a character or nature that the traveler will naturally or probably throw the same, immediately after so taking them, upon or litter the street, or place the same where they may be or may become calculated to frighten or injure or endanger horses. So that, by the very terms of the ordinance, the offense is made to consist, not in the mere act of distributing handbills or circulars, but in the distributing of such handbills or circulars as will probably or naturally be thrown away, and result in the littering of the street or frightening of horses. In *Frazer's Case*, 63 Mich. 396, 30 N. W. 72, commonly known as the "Salvation Army Case," it was held that an ordinance which prohibited all persons from parading or riding in the streets of Grand Rapids with musical instruments, etc., without having first obtained the consent of the mayor, was void, because it sought to "suppress what in general is perfectly lawful, and leaves the power of permitting or restraining processions to an unregulated official discretion." These cases can, we think, be distinguished in principle from the one now before us. In the distributing of circulars or handbills which are, in themselves, unobjectionable, or in the parading of the streets with musical instruments, there is nothing unlawful, and an absolute prohibition of the same might be beyond the power of the city council to enforce; but the safety of the people who use the streets and sidewalks does require some

restraint upon indiscriminate distributing of handbills and circulars of such a nature as have a tendency to frighten horses, or which will litter the streets. It is a matter of common knowledge that nothing is more likely to frighten horses than pieces of paper carried by the wind through the streets around and about the places where such horses may be. Any practice which naturally tends to cause the littering of the street with loose papers, which, flying about, will cause fright to horses, and so tend to the injury of the public, is not a lawful practice, and the enforcement of this ordinance will discourage and put a stop thereto. In another view of the case, this ordinance is reasonable. The throwing of loose handbills and circulars into the street is certainly reprehensible, and is a matter for police regulation. If one, therefore, hands to another a handbill which the latter naturally will at once throw into the street, the former is a party to the prohibited act. The one who distributes the circular to the one who actually drops it in the street, to the injury of the public, is just as guilty as he who directly drops the paper. Indirectly, he contributes to the wrong, and should be held liable the same as if he himself threw into the street the objectionable article. The evident object of the ordinance in question is to prevent the littering of the street and the frightening of horses. It certainly tends to the accomplishment of one of the purposes for which the city was incorporated, viz. the protection of its inhabitants from danger as they pass along its streets, engaged in their business. Such an object is certainly legitimate, and the means employed are reasonable, and surrounded by sufficient safeguards. The ordinance is free from the objections which seem to prevail with the supreme court of Michigan in the cases cited. With the construction which we have put upon the section under consid-

eration, "the actual operation of the ordinance in all cases which may be brought thereunder" cannot result in the injustice which is urged as likely to follow its enforcement. We hold the ordinance valid, as a reasonable exercise of the police power of the city, delegated to it by the legislature.

There are, however, errors apparent in the record which compel a reversal of this case. Over the objection of defendant's counsel, the court orally instructed the jury. This is error. *Lee v. Stahl*, 9 Colo. 208, 11 Pac. 77; *Code*, 1887, § 187, subd. 6.

Defendant had the right, so far as this ordinance is concerned, to distribute any circulars that were not of the objectionable character enumerated. The evidence, either of the plaintiff or defendant, should show that the circulars or handbills distributed by the defendant came within the enumeration of those whose distribution the ordinance prohibited. Whether or not they were of such a character was a question of fact, for the jury, not a matter of law, for the court. The jury must determine the questions of fact,—not only that the defendant distributed circulars as charged in the complaint, but also that these circulars were of the character specified as coming within the provisions of the ordinance. In the charge to the jury the court below eliminated the latter proposition, and, in effect, directed the jury to find the defendant guilty if they believed from the evidence that the defendant, with others, merely distributed the circulars or handbills which were offered in evidence. It is apparent that the court, as a matter of law, determined that the circulars which were distributed came within the prohibition of the ordinance, and in so doing it usurped the province of the jury. For these two errors committed by the court below the judgment should be reversed, and the cause remanded for a new trial. Reversed.

COMMONWEALTH v. FENTON.

(29 N. E. 653, 139 Mass. 195.)

Supreme Judicial Court of Massachusetts. Suffolk. March 23, 1885.

Exceptions from superior court, Suffolk county; Blodgett, Judge.

Nathaniel W. Fenton was convicted, under an ordinance of the city of Boston, of allowing his vehicle to stop in the street for more than 20 minutes, and brings exceptions. Exceptions overruled.

H. N. Shepard, Asst. Atty. Gen., for the Commonwealth. T. J. Emery, for defendant.

PER CURIAM. The regulation which prohibits any person from allowing his vehicle to stop in a public street for a longer time than 20 minutes is a valid police regulation. Pub. St. c. 28, § 25; Com. v. Brooks, 109 Mass. 355. The fact that the defendant had a license from the state as a hawker and peddler is immaterial. His license does not authorize him to violate the ordinances or police regulations of the city. He is subject to the regulation in question in the same manner as is any person exercising a trade which does not require a license. Exceptions overruled.

COMMONWEALTH v. MULHALL.

(39 N. E. 183, 162 Mass. 496.)

Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 1, 1895.

Exceptions from superior court, Suffolk county; J. B. Richardson, Judge.

Patrick Mulhall was convicted of violating a city ordinance, and excepts. Exceptions overruled.

Fred'k E. Hurd, First Asst. Dist. Atty., for the Commonwealth. G. W. Wiggin and P. H. Cooney, for defendant.

KNOWLTON, J. By Pub. St. c. 53, § 15. it is provided that "the mayor and aldermen and selectmen may make such rules and regulations for the passage of carriages, wagons, carts, trucks, sleds, sleighs, horse cars or other vehicles, or for the use of sleds or other vehicles for coasting in or through the streets or public ways of a city or town as they may deem necessary for the public safety or convenience, with penalties for violation thereof not exceeding twenty dollars for each offense." This statute was originally enacted in similar language in the statute of 1875 (chapter 136, § 1). The ordinance which the defendant is alleged to have violated is as follows: "No person shall carry or cause to be carried on any vehicle in any street a load, the weight whereof exceeds three tons, unless such load consists of an article which cannot be divided." The statute above quoted has reference to the safety and convenience of the public in the use of the streets. Many of the streets of Boston are greatly crowded, not only with pedestrians, but with vehicles of almost every kind. It cannot fairly be said that this ordinance

has no reference to the convenience or safety of the public who use the streets. We can see that very heavily loaded teams, drawn by four or six horses, in the most crowded parts of the city, might seriously interfere with the convenient use of the streets by others. If the ordinance is within the class of ordinances in regard to which this statute permits the mayor and aldermen to exercise their judgment and discretion, we cannot declare it void on the ground that we might have decided the question in reference to the necessity of the ordinance differently. If they deem such an ordinance necessary for the public safety or convenience, and if it is not a clear invasion of private rights secured by the constitution, it must stand as a regulation made under legislative authority. We think the facts offered to be proved do not take the case out of the field of regulation by the legislature, or by the mayor and aldermen as a local tribunal acting under the authority of the legislature. If it appeared that the ordinance could have no relation to the safety or convenience of the public in the use of the streets, the fact that the mayor and aldermen declare the regulation to be necessary would not give it validity. But we cannot say that they were in error in deciding that the use of heavily loaded vehicles is a matter affecting the public in the use of the streets, which may be regulated under the statute, nor can we say that the ordinance is anything more than a regulation, upon the necessity of which their decision is final. *Com. v. Plaisted*, 148 Mass. 375, 19 N. E. 224; *Com. v. Ellis*, 158 Mass. 555, 33 N. E. 651; *Com. v. Fenton*, 139 Mass. 195, 29 N. E. 653; *Com. v. Stodder*, 2 Cush. 562; *Com. v. Robertson*, 5 Cush. 438. Exceptions overruled.

BURDETT v. ALLEN.

(13 S. E. 1012, 35 W. Va. 347.)

Supreme Court of Appeals of West Virginia.
Dec. 7, 1891.

Error to circuit court, Kanawha county.

Action of detinue by S. C. Burdett against Dover Allen. Judgment for plaintiff. Defendant brings error. Reversed.

W. S. Laidley, for plaintiff in error. S. C. Burdett, in pro. per.

ENGLISH, J. On the 7th day of August, 1889, S. C. Burdett instituted an action of detinue against Dover Allen before C. W. Hall, a justice of the peace of Kanawha county, in which the plaintiff complained that the defendant unlawfully withheld from him one brindle cow of the value of \$50. The plaintiff filed affidavit and gave bond for the immediate possession of the property. On the 28th day of August the case was heard, and judgment was rendered for the plaintiff that he retain possession of the property, and that he recover from the defendant his costs in said suit. From this judgment the defendant took an appeal to the circuit court of said county, and on the 10th day of April, 1890, said appeal was submitted to the circuit court of Kanawha county upon an agreed statement of the facts, upon consideration whereof, and after hearing the argument of counsel thereon, the said court was of opinion that the ordinance of the city of Charleston in relation to the impounding and sale of animals is unconstitutional, and rendered judgment for the plaintiff for said property claimed in said action, and for costs, and from this judgment the defendant applied for and obtained this writ of error.

It was agreed between the plaintiff and the defendant that the following are the facts to be taken as proven by the respective parties: By the plaintiff: That he lives in Charleston, and that he is the owner of the cow which the suit is about; that on the evening of the 7th day of August, 1889, the plaintiff found his said cow in charge of Dover Allen, the city pound-master, and that he demanded the release of his cow, which was refused until the charges thereon were paid, and to pay the same or any sum the plaintiff declined, and thereupon he brought said action, and the said cow was delivered to him by the constable on the order of the justice aforesaid, and that on the trial of said action before the said justice judgment was given for the plaintiff, the said court holding that said ordinance under which the said cow was held was unconstitutional and void. Also the charter and ordinances of the city were put in evidence. By the defendant: That he was on the 6th day of August, 1889, and has since been, and is yet, pound-master of the city of Charleston; that he was then, and is yet, exercising the duties of said office under and by virtue of the ordinances of said city; that

between 10 and 12 o'clock, the said Allen, with two boys he had to assist him in hunting for and driving in stray cows, were out on the street, and found said cow of plaintiff in the public street, and that they drove her to the city pound, and fastened her therein that night, and kept her in said pound until taken away by the constable the next day; that on the evening of the 7th of August the plaintiff came and demanded his cow, claiming her, and defendant demanded his fees, etc., allowed him by the city ordinance, which at that time amounted to two dollars, and the plaintiff refused to pay the same, and thereupon the defendant refused to give up the cow, and the plaintiff brought said action before Justice Hall, and upon his order the constable took the cow from the defendant; that the said charges of two dollars are still unpaid; that upon the trial before the said justice his decision was that the said city ordinance was unconstitutional and void, and he gave judgment for the plaintiff, from which judgment the said defendant appealed; that the said lot in which said cow was impounded was the city pound, made so under and by virtue of an ordinance adopted June 30, 1887; and this was all the evidence adduced.

The counsel for the defendant in error contends that the ordinance of the city of Charleston under which the property of said defendant in error was seized and impounded is void because (1) there is no express authority conferred by the charter, either in chapter 47 of the Code or the special charter of the city of Charleston; that the power to impound and sell animals must be expressly conferred, and a general authority given to prevent animals from running at large is not sufficient. The first section of chapter 47 of the Code provides that "a city, town, or village heretofore established, (other than the city of Wheeling,) may exercise all the powers conferred by this chapter, although the same may not be conferred by their charter, and that, so far as said chapter confers powers on the municipal authorities of a city, town, or village, (other than said city of Wheeling,) not conferred by the charter of any such city, town, or village, the same shall be deemed an amendment to said charter;" and section 28, which prescribes the powers and duties of the council, provides, among other things, that such council shall have power therein "to prevent hogs, cattle, horses, sheep, and other animals and fowls of all kinds from going at large in such city, town, or village;" and section 29 of said chapter provides that, "to carry into effect these enumerated powers and all others conferred upon such city, town, or village, or its council, by this chapter, or by any future act of the legislature of this state, the council shall have the power to make and pass all needful orders, by-laws, ordinances, resolutions, rules, and regulations not contrary to the constitution and laws of the state, and to prescribe,

impose, and enact reasonable fines, penalties, and imprisonments in the county jail. * * * Such fines, penalties, and imprisonments shall be recovered and enforced under the judgment of the mayor of such city, town, or village or the person lawfully exercising his functions." The ordinance of the city of Charleston in reference to the public pound was put in evidence in this case, and the first section thereof provides that the inclosure attached to the city hall be, until otherwise ordained by the council, constituted the public pound for the impounding of animals therein subject to be impounded. It also provides in section 2 that "it shall be unlawful for any person being the owner or having charge of any cow, calf, or ox to allow the same to run at large between sunset and sunrise in any of the streets, lanes, alleys, or commons of said city below the Elk and Piedmont roads;" and section 4 provides: "It shall be the duty of the pound-master, on view or information, forthwith to take up all or any such animals running at large as aforesaid, and shut up the same in the public pound," there to be retained and fed until disposed of as hereinafter provided. Section 5 provides that the owner shall be notified forthwith; and section 6 provides that, in case the owner shall not within 48 hours after giving said notice appear and prove his right to such animal, the pound-master shall make his return to the mayor, setting forth the number and kind of animals taken up, time when taken, owner of the animal, if known, the fact of giving the notice, and that 48 hours have passed since such notice was given or posted, and that the animal or animals still remain in the pound unclaimed. Section 7 provides that the mayor shall then direct the sergeant to advertise and sell said animals, and prescribes the mode of advertisement; and further directs that the sergeant shall make return to the mayor of his proceedings, and shall pay all surplus money arising from said sales to the treasurer; and section 9 provides that "any person being the owner * * * of such animal," who shall within one year show to the mayor that he was such owner,

shall have any surplus in the hands of the treasurer arising from the sale of such animal paid over to him, said surplus to be paid on the order of the council. These ordinances, enacted under the power so to do conferred by section 29 of chapter 47 of the Code, appear to me to confer express authority upon the pound-master, acting in connection with, and under the supervision of, the mayor, to impound cattle found running at large in the city, and hold them until the fees and costs are paid, or to sell the same after notice to the owner, and, after deducting said costs and fees, to pay the residue to the owner when he asserts his claim thereto. It is true that Dillon on Municipal Corporations (volume 1, § 150) states that "power to impound and forfeit domestic animals must be expressly granted to the corporation, and that laws or ordinances authorizing the officers of the corporation to impound, and, upon taking specified proceedings, to sell, the property, are penal in their nature, and, where doubtful in their meaning, will not be construed to produce a forfeiture of the property, but rather the reverse;" and then proceeds to state that the powers conferred must be strictly followed in order to constitute a valid sale of such animal. In the case under consideration, however, no sale took place; the animal was only taken up and impounded, and, under section 28 of chapter 47, providing that the council of such city, etc., shall have power therein to prevent cattle from going at large therein, taken in connection with section 29 of the same chapter, authorizing the council to make and pass all needful orders, by-laws, ordinances, and resolutions, etc., not contrary to the constitution and laws of the state, to carry into effect said power, the impounding officer, under the provisions of the ordinances above mentioned, would surely have the authority to take up and impound such animal found running at large at night in the streets of the city.¹

* * * * *

¹ Part of opinion is omitted.

WILSON v. BEYERS, Town Marshal.

(32 Pac. 90, 5 Wash. 303.)

Supreme Court of Washington. Dec. 1, 1892.

Appeal from superior court, Douglas county; Wallace Mount, Judge.

Replevin by W. C. Wilson against Robert Beyers, town marshal of the town of Waterville. Judgment for defendant. Plaintiff appeals. Reversed.

The ordinance referred to in the opinion authorizes the town marshal to seize stock running at large; to post a notice to that effect; and if the stock is not claimed, and charges paid, in 48 hours, to advertise and sell the property. The question presented is, does this constitute due process of law?

Geo. Bradley, for appellant. Pendergast & Malloy, for respondent.

DUNBAR, J. This cause was submitted to the court on an agreed statement of facts, which involved the validity of a certain town ordinance of the town of Waterville, (a town of the fourth class.) providing for the impounding and sale of cattle running at large upon the public streets of said town. Plaintiff brought his action in replevin for certain cattle sold by defendant, and said to be unlawfully detained by respondent, who, as city marshal of said town of Waterville, seized the cattle under the provisions of said ordinance. Defendant moved for judgment upon the agreed facts, and judgment was rendered upon said motion in his favor, and plaintiff appeals. The contention of the appellant is that the ordinance in question is void, for two reasons: (1) That it is in violation of section 3, art. 1, of the constitution of the state of Washington;¹ (2) that said ordinance is invalid because the said town had no authority under the statute to pass it.

So far as the first proposition is concerned, there can be no doubt that the overwhelming weight of authority is opposed to the contention of appellant, and that the right to restrain cattle from running at large, under the provisions of the ordinance passed in conformity with the grant of such power by the legislature, is a valid exercise of police power, and is not violative of any constitutional provision. Such power has been conferred on municipal corporations from time immemorial, and is founded on public necessity, protection of public health, safety, and comfort; and but few courts have questioned its validity. There have been many contentions over the reasonableness or unreasonableness of the notice given by the provisions of the ordinance, and many decisions holding the notice unreasonable, but they did not go to the right of the city to pass an ordinance of this character. In other cases the ordinance provided for the collection of the damages which the

stock may have done, and some courts have decided that the question of damages should be submitted to a jury. This was the question decided in *Bullock v. Gamble*, 45 Ill. 218, cited by appellant. In *Willis v. Legris*, 45 Ill. 289, cited by appellant on this point, the question of a penalty was involved, which is not involved in the case at bar. Sustaining the validity of this and kindred ordinances, we cite: *Dill. Mun. Corp.* §§ 308, 350; *Cooley, Const. Lim.* § 588; *McKee v. McKee*, 8 B. Mon. 433; *Jarman v. Patterson*, 7 T. B. Mon. 644; *Brower v. Mayor*, 3 Barb. 254; *Milbau v. Sharp*, 17 Barb. 435; *Van Wormer v. Mayor*, 15 Wend. 262; *Mayor v. Lanham*, 67 Ga. 753; *Com. v. Bean*, 14 Gray, 52; *Brophy v. Hyatt*, 10 Colo. 223; *Spitler v. Young*, 63 Mo. 42; *Folmar v. Curtis*, 86 Ala. 354, 5 South. 678; 10 Am. & Eng. Enc. Law, 187, and cases cited. So far as the question of notice is concerned, as not being due process of law, proceedings under the ordinance are proceedings in rem. It is only the property that is dealt with; no personal liability attaches to the owner; and in an action in rem constructive service by publication is sufficient to give validity to the judgment obtained.

The second proposition, however, is more troublesome. The statute does not, in express terms, grant the power to the city council of cities of the fourth class to pass ordinances for the impounding of cattle or other stock, or to restrain them from running at large within the city limits. The question, then, is, has this power been conferred by necessary implication? As a general proposition it may be said that the city corporation is an inferior body, and has no other powers than those which have been expressly delegated to it, and their appropriate incidents. But what the appropriate incidents of expressly conferred powers are, is a question exceedingly difficult to determine, and one which has provoked the announcement of many conflicting opinions by the courts; and the text writers, while assuming to lay down rules for the construction of the statutes in such cases, leave the meaning of the rule so clouded as to render it of little assistance to the courts. Thus, in *Horr & B. Mun. Ord.*, it is announced in section 18 as follows: "The charter or statute granting powers to municipal corporations usually enumerates those which may be exercised. It is a general rule that all powers not mentioned in the enumeration, and not incidental to those enumerated, are not intended to be included in the grant. All other powers are impliedly excluded." All the force of the rule of construction thus laid down is, however, annulled by the following proviso: "But enumeration of special cases does not, unless the intent be apparent, exclude the implied power, any further than necessarily results from the nature of the special provisions." These oracular announcements, when construed together, contain no rule of construction whatever. The rule of strict construction against the corporation is, however, thus laid down by Judge Dil-

¹ Const. art. 1, § 3, provides that "no person shall be deprived of life, liberty, or property without due process of law."

lon in his work on Municipal Corporations, (section 89 and notes:) "Corporate power, being delegated, must be strictly construed and plainly conferred. Whenever a genuine doubt arises as to the right to exercise a certain power, it must be resolved against the corporation, and in favor of the general public. This rule is most strictly observed in constraining powers that may lead to an infringement of personal or property rights." In *Smith v. Calloway*, 7 Ind. 86, it is held that the application of the above rule could not be made to defeat the right to exercise powers which are incidental to the good government of the community. In *City of Waco v. Powell*, 32 Tex. 258, under the provisions of the statute granting to a city government general control over the streets, similar to the provisions of our statutes relating to cities of the fourth class, it was held that such power authorized the enactment of an ordinance for the impounding of cattle; and it was further held that the authority to pass such an ordinance existed not only under the general powers granted, but by reason of the power granting control of the public streets to the city. "The right of individuals," said the court, "to convert the public streets into a hog, cow, or horse ranch, by allowing or compelling their stock to run there, cannot exist, compatible with the right of the board of aldermen to control the same streets. The two rights are inconsistent, and cannot exist together." The same doctrine is stated in several other cases. While other courts have gone still further, and held that under a general legislative provision that 'the city or town shall have the right to make all necessary laws, not repugnant to the laws of the state,' such city has power to pass ordinances to restrain cattle from running at large. *Com. v. Bean*, 14 Gray, 52. While many other courts have held that such power could not be legally implied. *Varden v. Mount*, 78 Ky. 86; *Collins v. Hatch*, 18 Ohio, 523. It is pretty well conceded by the authorities that the term "general welfare," used in legislative grants of power to municipal corporations, is of broader scope, and confers greater powers on corporations, than such expressions as "peace and good order" and "peace and good government," and that many things are essential to the public welfare which belong neither to the preservation of peace and good order, nor to the exercise of good government. The general author-

ity conferred by our statute is as follows: "To make all such ordinances, by-laws, rules, regulations, and resolutions, not inconsistent with the constitution and laws of the state of Washington, as may be deemed expedient to maintain the peace, good government, and welfare of the town, and its trade, commerce, and manufactures, and to do and perform any and all other acts and things necessary or proper to carry out the provisions of this chapter." ² So that it will be seen that the statute not only contains the "peace and good government" provision, but also contains the "general welfare" provision; for the word "welfare" is fully as comprehensive as the term "general welfare." And under this provision we might be constrained to give it the liberal construction contended for by respondent, were we called upon to construe the powers granted to any particular city, independent of its relations to any other provisions of the statute. But under our laws cities are divided into four classes, and their organization, classification, incorporation, and powers are all provided for in one act; and to arrive at the intention of the lawmakers the act must be construed together. It will be observed from the perusal of the act that the same general powers are granted to cities and towns of the third and fourth classes as are granted to cities of the second class, yet the statute expressly confers upon cities of the second and third classes power to prevent and regulate the running at large of any and all domestic animals within the city limits, while this power is not specified in the specific grants of power to cities of the fourth class. It also appears that many other powers are granted to large cities which were not granted to the smaller ones, and it was the evident intention of the legislature to confer many powers on the larger cities which were withheld from the smaller ones. Considering the act together, as we must, we must conclude that this provision being made as to one class of cities, and not as to the other, it was not the intention of the legislature to confer the power by implication, and that the ordinance is therefore invalid. The judgment is reversed.

ANDERS, C. J., and STILES, SCOTT, and HOYT, JJ., concur.

² 1 Hill's Ann. St. § 673, subd. 16.

CITY OF ROSEDALE v. GOLDING.

(40 Pac. 284, 55 Kan. 167.)

Supreme Court of Kansas. April 30, 1895.

Error from district court, Leavenworth county; Robert Crozier, Judge.

Action by Patrick Golding against the city of Rosedale for injuries to his minor son. Plaintiff having died, Sarah Golding, his administratrix, was substituted as plaintiff. Judgment for plaintiff, and defendant brings error. Affirmed.

Van Syckel & Littick, for plaintiff in error. Byron Sherry and Roland Hughes, for defendant in error.

JOHNSTON, J. In July, 1886, John Golding, who was about 17 years of age, resided with his father and mother in Rosedale, and worked in a packing house in Armourdale. On one of the principal streets of Rosedale there was a bridge which spanned Turkey creek, and the boy passed over this bridge in going to and from his work. On the evening of July 1, 1886, while riding a pony over the bridge, on his way home, he met a team, and, in passing, a trace or some other part of the harness of the other team touched the pony, causing him to flinch and jump aside, so as to precipitate the boy and pony off the edge of the bridge, down into the creek, a distance of about 12 feet. The boy suffered severe and permanent injury from the fall. An action was brought by his father, Patrick Golding, to recover for medical and surgical attendance, hospital charges, loss of the pony, and for the loss of the services of John Golding from the time of his injury until he reached majority. Patrick Golding died soon after the commencement of the action, and Sarah Golding was appointed administratrix of his estate, and the action against the city was duly revived in her name. The right of recovery was based on the neglect of the city in permitting the bridge to remain without proper guards or railings on the sides of the same, and that it was therefore not in a reasonably safe condition for the use of the public. Upon the trial the jury returned a verdict in favor of plaintiff, and against the city of Rosedale, in the sum of \$2,336. The only serious contention of the city in the trial

court was that the bridge had been built and maintained by the county, and that, therefore, no liability could arise against the city for injuries resulting from its defective condition. While the bridge had been built by the county, it formed a part of one of the principal streets of the city. It was the duty of the city to keep and maintain the streets and the bridges thereon in such a condition as to be reasonably safe for persons traveling upon and over the same, and it is liable in damages to any one who suffers injuries resulting from a neglect to perform this duty. The fact that the bridge was in this instance built by or had been maintained at the expense of the county does not relieve the city from the obligation to keep a bridge which is upon one of the public streets within its corporate limits in a reasonably safe condition for the traveling public. A claim is made that there was no testimony showing the location of the bridge, but we find, upon an examination of the record, that there is abundant proof to show that it was within the corporate limits of Rosedale, and "a bridge situated wholly within the limits of the city is, with its approaches, a part of the public streets, and as such within the scope of the city's duties and liabilities." *City of Eudora v. Miller*, 30 Kan. 494, 2 Pac. 685. See, also, *Commissioners of Shawnee Co. v. City of Topeka*, 39 Kan. 197, 18 Pac. 161. It is clear that the city was negligent in failing to place a guard or rail along the side of a high bridge that was 60 feet long. There is a claim that the boy was guilty of contributory negligence because he knew or should have known of the dangerous condition of the bridge, but, under the testimony, it cannot be said as a matter of law that he was guilty of negligence in crossing the bridge. That question was submitted to the jury under proper instructions, and, they having found that the city was negligent and the boy without fault, the finding is conclusive. The claim that the verdict is excessive is not sustained by the record, and the other questions which the plaintiff in error seeks to raise were not before the district court, and therefore are not reviewable in this court. The judgment of the district court will be affirmed. All the justices concurring.

CITY OF KANSAS CITY v. LEMEN.

(6 C. C. A. 627, 57 Fed. 905.)

Circuit Court of Appeals, Eighth Circuit. Sept.
18, 1893.

No. 270.

In Error to the Circuit Court of the United States for the Western District of Missouri.

At Law. Action by Frank Lemen against the city of Kansas City, Mo., for wrongfully closing an exhibition held by plaintiff in said city. Verdict and judgment for plaintiff. Defendant brings error. Reversed.

C. O. Tichenor, F. F. Rozzelle, and Frank P. Walsh, for plaintiff in error.

W. C. Searritt, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

THAYER, District Judge. Frank Lemen filed in the United States circuit court for the western district of Missouri a complaint against Kansas City, a municipal corporation of the state of Missouri, wherein he alleged substantially the following facts: That he was a citizen and resident of the state of Kansas, and the proprietor of a show and hippodrome; that, desiring to exhibit said show in Kansas City, Mo., on the 3d and 4th days of May, 1892, he, before that time, lawfully acquired from the owners of a certain tract of land situated within the corporate limits of Kansas City the right to give an exhibition thereon, and that he took peaceable possession of said land with the consent of the owner, and erected his tents thereon, and that he also fully complied with all of the ordinances and regulations of the city with reference to such exhibitions as he proposed to give, and obtained a license for the exhibition from the proper city authorities, entitling him to give two exhibitions, for which he paid to the city \$20; but that on the day appointed for the exhibition, and just before it was to begin, "the defendant, Kansas City, acting by and through its mayor, police, and other duly constituted and authorized agents, (the said mayor,) personally consenting and directing all things, did willfully, with knowledge that they were acting wrongfully, and without right, and with the intention to harass and oppress the plaintiff, and to break up and ruin his said business, with force and violence come upon said land, and with threats and violence did stop plaintiff from prosecuting his said business, and did put a stop to the exhibition of the said show, and did then and there threaten and began to tear down and break and destroy plaintiff's said tents and property, and did with force seize upon the person of the plaintiff and arrest him, falsely pretending that he had violated some city ordinance, * * * and did threaten to arrest and imprison plaintiff's employes unless they desisted from carrying on plaintiff's said business, falsely pretending that such employes thereby were violating some ordinance

of Kansas City; and did stop, prevent, and warn the people from coming into plaintiff's said show, and from purchasing tickets thereto, * * * and compel and require plaintiff to cancel his appointments to exhibit his show at the place and times aforesaid, and to remove all his property and effects from said tract of land, and did greatly injure and discredit his said business," etc.

The answer which was filed by the city to such complaint (and we only state the substance thereof, after some portions had been eliminated by a motion to strike out) was as follows: The city admitted its corporate capacity, and that the plaintiff intended, and had in fact made preparations, to give an exhibition at the time and place stated in his complaint. It denied, however, that the plaintiff had the consent of the owner of the tract of land described in his complaint to give an exhibition thereon, and averred, to the contrary, that the title to said tract of land was vested in the city, as trustee, to be held for the purposes of a graveyard, and that it had been so vested and held for more than 30 years, and that the remains of many persons had been buried therein, and that many were still entombed in said tract of land. The city further admitted that a license was issued by it to the plaintiff to give an exhibition on said ground, and that he had paid \$20 therefor; but it averred that the city had no power to issue a license for a show in a graveyard; and that the police of the city had notified the plaintiff, prior to the intended exhibition, that he could not give an exhibition on the ground selected, because it was a graveyard, and because an exhibition in such place would be a public nuisance, whereupon the plaintiff had withdrawn from said premises, and had removed his tents elsewhere to a place within the city, and had given an exhibition for two days under the license in question.

To the foregoing answer a reply was filed, which denied that the city held the title to the aforesaid tract of land as a graveyard. It was further averred that in a previous suit brought against Kansas City by certain persons who claimed title to said tract of land it was judicially ascertained and adjudged that the lot was not a graveyard, and that in said suit said last-named claimants had recovered the property; and that Lemen acquired his right to give an exhibition on the premises under the said claimants, they being at the time in the quiet and peaceable possession and enjoyment thereof.

The case was tried before a jury on the foregoing issues, and the plaintiff below recovered a verdict against the city in the sum of \$2,200. To reverse the judgment entered upon such verdict, the plaintiff in error has prosecuted a writ of error to this court.

Several exceptions were taken by the plaintiff in error to the action of the circuit court in admitting testimony and in giving and refusing instructions, but the view that we

have taken of the case only renders it necessary to determine whether the court erred in refusing to charge that the city could not be held liable for the wrong and injury complained of.

The distinction that exists between the various powers ordinarily exercised by municipal corporations has been pointed out on numerous occasions, and is well defined. In exercising certain powers, such corporations act for the public at large as governing agencies, and for that reason, when so acting, they cannot be held liable for a misfeasance. When acting in a public capacity, as governing agencies, the rule of respondeat superior has no application to acts done by the officers of such corporations, but the responsibility for a wrongful act rests with the officer, and not with the municipality. In the exercise of many other powers devolved upon municipal corporations, commonly termed "corporate powers," such bodies act for the special benefit of the municipality, or the municipality derives some profit, emolument, or advantage from their exercise, and in such cases the municipality is liable for acts of misfeasance done by its officers that are positively injurious to individuals.

In *Maximilian v. Mayor*, 62 N. Y. 160, Folger, J., says: "There are two kinds of duties which are imposed upon a municipal corporation: One is of that kind which arises from the grant of a special power, in the exercise of which the municipality is as a legal individual. The other is of that kind which arises or is implied from the use of political rights under the general law, in the exercise of which it is as a sovereign. The former power is private, and is used for private purposes; the latter is public, and is used for public purposes. * * * In the exercise of the former power, and under the duty to the public which the acceptance and use of the power involves, a municipality is like a private corporation, and is liable for failure to use its power well, or for any injury caused by using it badly; but where the power * * * is conferred not for the immediate benefit of the municipality, but as a means to the exercise of the sovereign power for the benefit of all citizens, the corporation is not liable for nonuser nor for misuser by the public agents." Citing *Eastman v. Meredith*, 36 N. H. 284.

The distinction thus referred to is also recognized in the state from which this case comes, (*Hannon v. County of St. Louis*, 62 Mo. 313, 318,) and is stated, and supported by numerous citations, in *Dillon on Municipal Corporations*, (vide 4th Ed. §§ 966-968, 974.)

In the case at bar we feel constrained to hold that the wrongful act complained of was done by the city under color of a power which it exercises as a governing agent for the benefit of the public at large, and not for the advantage of the inhabitants of Kansas City, except as they form a part of the general pub-

lic. The establishment of a public show, such as a menagerie, circus, or hippodrome, on a tract of land dedicated to a city or town for the purposes of a graveyard, and actually used as such, would constitute a public nuisance. A city has no more right to license a show of that nature in a graveyard than it has to license it to locate on the public streets and thoroughfares; and we entertain no doubt that when a municipality undertakes to prevent or to abate a nuisance of that kind by means of its police force it is acting for the state as a governing agency, and not merely in the discharge of a purely corporate power or duty.

In the case of *Haskell v. City of New Bedford*, 108 Mass. 208, 211, Mr. Justice Gray, then on the bench of the supreme judicial court of Massachusetts, used the following language: "Acts done by the mayor and aldermen, or the mayor alone, to keep the streets clear of obstructions, are acts done by them as public officers, and not as agents of the city; and for such acts the city was not liable to be sued;" citing *Walcot v. Swampscott*, 1 Allen, 101; *Griggs v. Foote*, 4 Allen, 195; *Barney v. Lowell*, 98 Mass. 570; and *Fisher v. Boston*, 104 Mass. 87.

In a comparatively recent case—*Culver v. City of Streator*, 130 Ill. 238, 22 N. E. 810—it was held that the city was not liable for the negligent act of one of its police officers while endeavoring to enforce an ordinance forbidding dogs to run at large without being muzzled, for the reason that in the making and enforcement of the ordinance the city was acting merely as agent of the state in the discharge of duties imposed by law for the promotion of the general welfare. The court said that the ordinance was passed in pursuance of the police power vested in the municipality, and that acts performed in the exercise of that power were done in a public capacity as a governing agency, and not for the special advantage of the municipality.

It is also very generally held that a city is not liable for wrongful acts committed by its police officers in enforcing city ordinances, or in making arrests for alleged violations of law or local ordinances, or while endeavoring to suppress an unlawful assemblage, because while acting in such matters, police officers are not mere servants of the municipality, and the rule of respondeat superior does not apply. *Buttrick v. City of Lowell*, 1 Allen, 172; *Fox v. Northern Liberties*, 3 Watts & S. 103; *Calwell v. City of Boone*, 51 Iowa, 687, 2 N. W. 614; *Odell v. Schroeder*, 58 Ill. 353; *Elliott v. Philadelphia*, 75 Pa. St. 347; *Dargan v. Mobile*, 31 Ala. 469; *Little v. City of Madison*, 49 Wis. 605, 6 N. W. 249; *Trammell v. Russellville*, 34 Ark. 105; *Worley v. Inhabitants*, 88 Mo. 106; *Dill. Mun. Corp.* § 975.

We can entertain no doubt, therefore, that for the acts complained of in the present case there is no right of redress against the city, assuming them to have been done or author-

fized by the city, as stated in the plea, for the purpose of preventing a public exhibition on a tract of land dedicated and used as a graveyard. The act of the municipality in that behalf was an exercise of a power vested in it to promote the general welfare, as contradistinguished from those corporate powers which it exercises for the special advantage of the municipality.

It was said in the course of the oral argument that the plea interposed by the city, that the tract of land in question was a graveyard, and that the city had acted with a view of preventing its desecration, was a mere pretense; that in fact it had some ulterior purpose in view, and was seeking some private gain or advantage, when it committed the wrongful acts charged in the complaint. With reference to this statement, it is sufficient to say that no such suggestion is found in the pleadings. To the plea that the premises were held in trust by the city as a graveyard, that the license issued by the city conferred no right to give an exhibition at the place in question, and that the city had acted solely with a view of preventing a public nuisance, the plaintiff merely replied that it was not a

graveyard, and that that fact had been judicially ascertained and adjudged in a previous suit, whereto the city was a party. We think, therefore, that the suggestion above mentioned is of no avail to the defendant in error on this record. We must take it for granted that the plea interposed by the city was made in good faith, and correctly states the purpose which inspired its action.

Furthermore, if it be true, as suggested, that the city knew that the premises were not a graveyard, and that they were in fact private property, and that it had some ulterior object in view, and intended to wrong and oppress the plaintiff, then it is difficult to escape the conclusion that the acts said to have been committed by the police with the sanction of the mayor were so utterly beyond the scope of any corporate power vested in the municipality, that it could not be held liable on that ground. Dill. Mun. Corp. §§ 968-970.

Our conclusion is that the circuit court erred in refusing to direct the jury to find a verdict in favor of the city, wherefore the judgment of the circuit court is reversed, and the cause remanded, with directions to grant a new trial.

SNIDER v. CITY OF ST. PAUL.

(53 N. W. 763, 51 Minn. 466.)

Supreme Court of Minnesota. Dec. 2, 1892.

Appeal from district court, Ramsey county; Kelly, Judge.

Action by Jennie Snider against the city of St. Paul for damages for injuries resulting from defendant's negligence. Judgment for defendant. Plaintiff appeals. Affirmed.

B. H. Schriber, for appellant. D. W. Lawler, J. C. Michael, and Davis, Kellogg & Severance, for respondent.

MITCHELL, J. The complaint alleges that the city of St. Paul and the county of Ramsey owned and possessed, as tenants in common, a building known as the "Courthouse and City Hall;" that they negligently constructed the entrance to one of the elevator shafts in an unsafe manner; also that their servant in charge of the elevator handled it negligently, whereby the plaintiff was injured. As one of its defenses, the city pleaded the various statutes regulating the construction, custody, and use of the building, particularly Sp. Laws 1881, c. 376, and Sp. Laws 1889, c. 64. Briefly stated, the act of 1881 created a special courthouse commission, consisting of the mayor of the city of St. Paul (who was ex officio a member) and five other persons, to be appointed by the judges of the district court of Ramsey county. This commission was to prepare plans for a building for the use of the city and county "for a city hall and county courthouse, and for offices for the city and county officers, and such other public uses as may be deemed expedient," and submit the same, together with an estimate of the cost, to the board of county commissioners and the common council of the city for their approval. Upon their approval of the plans the commission was to proceed and construct the building, which was to be paid for out of the proceeds of a fund called "the courthouse and city hall building fund," which was to be raised by the issue and sale of bonds of the city and of the county. The act further provided that the city and county "shall hold the land occupied and needed for said building, together with the building which may be erected thereon, in common, and for the public uses aforesaid." The act of 1889 provided that when completed the building should be placed in charge of a committee of seven, to be appointed as follows: Three annually by the president of the common council, and three annually by the chairman of the board of county commissioners; and that the mayor of the city should be ex officio a member and the chairman of the committee. This committee was to have entire charge of the building, with power to appoint such janitor, custodian, and other employes as they should deem necessary for the proper care and management of the building. The answer also alleges that the city has never had any control

over either the construction or custody of the building, which have been entirely under the direction and control of the courthouse commission and committee referred to. The court overruled a demurrer to this defense, placing its decision on two general grounds: First, that the special courthouse commission which constructed the building, and the committee which has charge of it, were independent bodies, and not the agents or servants of the city, and hence that the city was not liable for their negligence; second, that even if the city had controlled the construction and custody of the building, it would, in so doing, have been performing merely a governmental duty for the benefit of the public, for any negligence in the performance of which no private action would lie. The decision might perhaps be sustained on either ground, but, as we are clearly of opinion that the second is well taken, it is unnecessary to consider the first.

The common-law rule is that no private action can be maintained against a municipal corporation for the neglect of a public duty imposed upon it by law for the benefit of the public, and from the performance of which the corporation receives no pecuniary profit. As respects what are sometimes called "quasi municipal corporations," such as counties, townships, and school districts, this is the rule everywhere, without exception. But as respects what are called "municipal corporations proper," such as cities and incorporated villages, the general current of the authorities is to the effect that, even in the absence of an express statute, they may be impliedly liable for acts of misfeasance or neglect of duty on the part of its officers and agents, while for the same or a similar wrong there is no such liability resting on quasi municipal corporations. The most noted and familiar instance of this is the different rule applied to towns and counties as respects liability for negligence in not keeping highways in repair, and that applied to incorporated cities for negligence in failing to keep streets in repair. But respecting the principle upon which to rest this distinction, or as to the nature of the duties to which it extends, the courts seem to be much perplexed, and their decisions, often in conflict with each other, leave the subject in some confusion. The ground for the distinction is not to be found in the mere fact that one is created by special charter, while the other is not, for both are alike subdivisions of the state, created for public, although local, governmental purposes. Nor is it to be found in the fact that the one is given greater powers than the other, unless the power is, not for public governmental purposes, but to engage in some enterprise of a quasi private nature, from which the municipality will derive a pecuniary benefit in its corporate or proprietary capacity; as, for example, power to build gasworks or waterworks, to furnish gas or water to be sold to consumers, or to build a toll bridge, from each of which the city would derive a revenue. In this class of cases it is generally held that cor-

porations are liable for wrongful or negligent acts, because done in what is termed their "private" or "corporate" character, and not in their public capacity as governing agencies, in the discharge of duties imposed for the public or general benefit. But it is also generally held that they are not liable for negligence in the performance of a public, governmental duty imposed upon them for public benefit, and from which the municipality in its corporate or proprietary capacity derives no pecuniary profit. The liability of cities for negligence in not keeping streets in repair would seem to be an exception to this general rule, which we think the courts would do better to rest either upon certain special considerations of public policy or upon the doctrine of stare decisis than to attempt to find some strictly legal principle to justify the distinction. And, as already suggested, as to what are public and governmental duties and what are private or corporate duties the courts are not in entire harmony, and their decisions do not furnish a definite line of cleavage between the two. Nor shall we attempt to fix any such line of universal application. For a quite full discussion of the subject, see Dill. Mun. Corp. c. 23; and for an exhaustive review of the authorities, see Hill v. Boston, 122 Mass. 344. In Dossdall v. County of Olmsted, 30 Minn. 96, 14 N. W. 458, we held that a county is not liable for the negligence of its board of county commissioners in failing to repair a courthouse, the duty

of maintaining a courthouse being a public one, and for a wholly public purpose. In Bryant v. City of St. Paul, 33 Minn. 289, 23 N. W. 220, we held that the city was not liable for the negligence of the board of health in the discharge of its duties, the same being public and governmental, and not corporate, in their character. And, for a like reason, in Grube v. City of St. Paul, 34 Minn. 402, 26 N. W. 228, we held that the city was not liable for the negligent acts of members of its fire department. We fail to discover any distinction in the character in this respect of the duty performed by the city in maintaining a board of health, a fire department, or a police department, and that performed in providing and maintaining a city hall for the use of the public officers of the city. The city, in its private or corporate capacity, derives no more pecuniary benefit from the one than it does from the others, and in each case alike the purpose is a public and governmental one. The duty which a city performs in providing a city hall for the use of the public officers of the city is exactly the same in its nature as that performed by a county in providing a courthouse for the use of the county officers. The inconsistency of holding that the county of Ramsey is not liable, (as must be, under the Dossdall Case,) but that the city is, would be forcible illustrated by the special facts of this case. Our conclusion is that the city is not liable.

Order affirmed.

BARRON v. CITY OF DETROIT.

(54 N. W. 273, 94 Mich. 601.)

Supreme Court of Michigan. Feb. 10, 1893.

Error to circuit court, Wayne county; Cornelius J. Reilly, Judge.

Action by Adolphus Barron against the city of Detroit to recover for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

John J. Speed, for appellant. I. G. Humphrey and Orla B. Taylor, (Edwin F. Conely, of counsel,) for appellee.

LONG, J. The facts in this case are not in dispute. It appears that in January, 1890, by resolution of the common council, the city engineer was instructed to prepare plans for the construction of a market building. The plans were prepared and submitted, in response to the resolution, and the board of public works was directed to advertise for proposals for constructing the building in accordance therewith. Proposals were advertised for, and the board of public works reported that Patrick Dee was the lowest bidder; and by instruction of the common council the board entered into a contract for the construction of the building with him, which contract was confirmed by the council. The plans were prepared by a draughtsman in the office of, and under the supervision of, the city engineer. The building was an open structure, on iron columns about 15 feet apart, surmounted by a roof composed of wood and iron. It was built in the form of a cross; being about 300 feet one way, and 400 feet the other. The columns rested upon stone piers, but were not anchored. At the time the plans were prepared, the propriety of anchoring the columns was discussed by the draughtsman and engineer. The draughtsman thought it ought to be anchored, but the engineer thought the construction strong enough, and his opinion was followed. He claims, however, to have looked the plans over hurriedly, and did not examine them carefully, for the reason that a competent superintendent was to be employed, and that the building would be properly constructed under him, and if any defect existed the omission would be supplied as the work progressed. The superintendent was appointed, and the work carried on under the contractor. Before it was completed some members of the board of public works expressed the opinion that the structure was dangerous, and would go down in a wind; and on the advice of the city engineer it was examined by architects, and upon their recommendation several braces were added, to strengthen it. One of the architects thus called says that he advised the inserting of some strips, and putting bolts through them, and anchoring them down; that it should be anchored in some way. These suggestions were referred

by the board of public works to the contractor, and he placed extra braces in the roof, but did not anchor the columns. It was testified by some of the architects that in such buildings, in this part of the country, 40 pounds to the square foot, wind pressure, is usually allowed; and it was further shown that the velocity of the wind, to exert 40 pounds' pressure, is 90 to 100 miles an hour. On December 23, 1890, in a wind blowing about 50 miles an hour, this market building fell; no other buildings in the vicinity being affected; so that it is apparent that the fault was in the failure to anchor the columns. The plaintiff was injured by the falling of the building. It is conceded that at the time he was lawfully upon the premises, having paid the usual license fee required and collected by the city. His claim for damages having been refused by the common council, this suit was brought, and he was awarded damages in the sum of \$1,000. By the charter of the city of Detroit the common council is authorized to erect and maintain market houses; erect markets and market places.

It is contended by counsel for the city that when the common council of the city authorized the making of plans and specifications for the market building, and directed the making of the contracts for its construction, it performed a purely legislative function; that the fault which occasioned the collapse of the building was in the plan, which failed to provide for anchoring it so that it could not be lifted from its foundation by the wind; that there was evident miscalculation as to the weight being sufficient to keep it in place. Counsel insists that the fault is with legislative action, and therefore a suit grounded upon it is grounded upon a wrong attributable to the legislative body itself, as the determination to construct the public work, and the prescribing of the plans, are matters of legislation on behalf of the city, under the direction of its legislative body; that in carrying out the plans there may be negligence attributable to ministerial officers, but negligence in the plans themselves must be attributable to the body that devised, ordered, or adopted them,—and therefore the action cannot be maintained, under the principle applied in *Larkin v. Saginaw Co.*, 11 Mich. 88; *Detroit v. Beckman*, 34 Mich. 126; *City of Lansing v. Toolan*, 37 Mich. 152; *Davis v. City of Jackson*, 61 Mich. 530, 28 N. W. Rep. 526. This contention would undoubtedly be correct, if the city had been acting purely in a matter of public concern, in its governmental capacity or character, and the cases cited would then be applicable. In *Larkin v. Saginaw Co.* the plaintiff sought to recover for injuries caused by a defective bridge, and it was held that the county was not liable for the acts of the board of supervisors in the exercise of its legislative power. In *Detroit v. Beckman*, *City of Lansing v. Toolan*, and *Da-*

vis v. City of Jackson, the actions were for injuries caused by defects in public highways. In each of these cases it was held that, when complaint is made that the original plan of a public work is so defective as to render the work dangerous when completed, the fault is with legislative action, and for which no action can be maintained. *Ashley v. Pt. Huron*, 35 Mich. 296, is to the same effect. Judge Dillon, in his work on *Municipal Corporations*, (3d Ed., § 66,) states the rule as follows: "A municipal corporation 'possesses a double character: The one, governmental, legislative, or public; the other, in a sense, proprietary or private. The distinction between these, though sometimes difficult to trace, is highly important, and is frequently referred to, particularly in the cases relating to the implied or common-law liability of municipal corporations for the negligence of their servants, agents, or officers, in the execution of corporate duties and powers. On this distinction, indeed, rests the doctrine of such implied liability. In its governmental or public character, the corporation is made, by the state, one of its instruments, or the local depository of certain limited and prescribed political powers, to be exercised for the public good on behalf of the state, rather than for itself. In this respect it is assimilated, in its nature and functions, to a county corporation, which, as we have seen, is purely part of the governmental machinery of the sovereignty which creates it. Over all its civil, political, or governmental powers the authority of the legislature is, in the nature of things, supreme and without limitation, unless the limitation is found in the constitution of the particular state. But, in its proprietary or private character, the theory is that the powers are supposed not to be conferred, primarily or chiefly, from considerations connected with the government of the state at large, but for the private advantage of the compact community, which is incorporated as a distinct legal personality, or corporate individual; and as to such powers, and to property acquired thereunder, and contracts made with reference thereto, the corporation is to be regarded, quo ad hoc, as a private corporation, or at least not public in the sense that the power of the legislature over it, or the rights represented by it, is omnipotent." This rule is supported by a great number of authorities from the several states, and from the decisions of the supreme court of the United States, in the note to the section above quoted. It is, however, challenged by *Denio, C. J.*, in *Darlington v. Mayor*, 31 N. Y. 164. He asserts the unlimited power of the legislature over municipal corporations and their property, and maintains that such corporations are altogether public, and all their rights and pow-

ers public in their nature, and that their property, though held for income or sale, and unconnected with any use for the purpose of municipal government, is under the control of the legislature, and not within the provisions of the constitution protecting private property. He denies the distinction between the public and private functions of city government, and maintains that, as respects the state, all their powers and functions are public. This doctrine, however, has not obtained in this state; but it is held that cities are mentioned in our constitution, in connection with local corporations, which are put upon a proper basis entirely beyond legislative interference, so far as local independence of action is concerned. Opinion of *Campbell, C. J.*, in *People v. Hurlbut*, 24 Mich. 86. In *Board of Park Com'rs v. Common Council of Detroit*, 28 Mich. 228, it was said by *Mr. Justice Cooley*: "We also referred in *People v. Hurlbut* to several decisions in the federal supreme court, and elsewhere, to show that municipal corporations considered as communities endowed with peculiar functions for the benefit of their own citizens have always been recognized as possessing powers and capacities, as being entitled to exemptions, distinct from those which they possess or can claim as conveniences in state government. If the authorities are examined, it will be found that these powers and capacities and interests which are acquired under them are usually spoken of as private, in contradiction to those in which the state is concerned, and which are called public; thus putting these corporations, as regards all such powers, capacities, and interests, substantially on the footing of private corporations." This same distinction was also made in *Detroit v. Corey*, 9 Mich. 164; *Mayor v. Park Com'rs*, 44 Mich. 602, 7 N. W. Rep. 180; *Niles Waterworks v. City of Niles*, 59 Mich. 324, 26 N. W. Rep. 525; *Cooper v. Detroit*, 42 Mich. 584, 4 N. W. Rep. 262. Under the facts in the case, the city must be held to the same degree of care, not only in the construction, but in the plan of the construction itself, as would a private corporation or an individual. Under the provisions of the charter granting the power to erect it, there was no imperative duty cast upon the city to provide for a market building. It could build it or not, as the council might determine. It is not like the case of a public highway, or the building of a bridge, where the duty is cast upon the municipality, by general law, to build and maintain them. Had this building been owned by an individual or a private corporation the liability of either for this accident would not have been questioned, under the facts stated. The judgment must be affirmed, with costs. The other justices concurred.

TATE v. CITY OF GREENSBOROUGH et al.

(19 S. E. 767, 114 N. C. 392.)

Supreme Court of North Carolina. May 22, 1894.

Appeal from superior court, Guilford county; H. G. Connor, Judge.

Action by Mattie M. Tate against the city of Greensborough and John L. King and Hugh L. Scott to recover damages for removing trees standing on the outer edge of the sidewalk in front of plaintiff's residence. Judgment for defendants, and plaintiff appeals. Affirmed.

R. M. Douglas, L. M. Scott, and J. A. Barringer, for appellant. Dillard & King and James E. Boyd, for appellees.

BURWELL, J. It is contended by the plaintiff, first, that, even admitting that the act of which she complains (the destruction of shade trees standing on the outer edge of the sidewalk in front of her residence, in the city of Greensborough) was done by the duly-authorized agents of that municipal corporation, she is still entitled to recover for the damage done to her property by the cutting down of these trees, because his honor has found that they did not obstruct the passage of persons on the sidewalk, that the public convenience did not require their destruction, and that the mudhole in the street, for the removing of which this act seems to have been done, could have been remedied without cutting them down. This phase of the case presents for our consideration this question: Can the courts review the exercise by the city of Greensborough of its power to repair and improve its streets, and remove what it considers obstructions therein, and find and declare that certain trees in the streets of that city, which the municipal authorities honestly believed were injurious and obstructive to the public, were in fact not so, and upon such findings, there being no allegation of negligence or of any want of good faith on the part of the city, award damages to an abutting proprietor, the comfort of whose home has been lessened by the removal of the trees?

The street in which these trees stood was dedicated to public use as a street by those under whom the plaintiff claims title. Holding control of this street by reason of its dedication only, the city nevertheless has exactly the same rights therein, and responsibilities therefor, as if it had been, by deed of the owner, conveyed to the corporation for use for street purposes, or had been condemned and taken for those purposes according to the provisions of the charter; and the rights of the plaintiff therein are no greater than if it had been so conveyed, or so condemned and taken. Now, the responsibilities that counties and townships assume, or are put under by the law, in relation to their highways, is very different from

those of cities and towns in relation to their streets. It is required that roads shall be kept in repair, and certain individuals, upon whom is cast, in one way or another, the burden of seeing that these repairs are made, can be indicted for failing to perform this duty; but the municipality (county or township) is not held liable for damages that may result from the road's being out of order, or obstructed. Cities and towns, however, are held to strict pecuniary accountability for the conduon of their streets. They are not political divisions of the state, made by it for convenience in its government of the whole, but are corporations chartered, presumably, at the request of the inhabitants, and granted privileges, and charged with corresponding responsibilities. Among the very gravest of the pecuniary responsibilities that the law imposes on cities and towns is liability for damages to persons and property, caused by a defective or improperly obstructed street. *Bunch v. Edenton*, 90 N. C. 431; *White v. Commissioners*, Id. 437. Hence it is that the law gives to all such corporations an almost absolute discretion in the maintenance of their streets; considering, it seems, as is most reasonable, that wide discretion as to the manner of performance should be conferred where responsibility for improper performance is so heavily laid. An illustration of this is the provision of the Code (section 3803) that the commissioners of towns "shall provide for keeping in proper repair the streets and bridges of the town in the manner and to the extent they may deem best." We think that under its charter, and under the general law of the state (2 Code, c. 62), the city of Greensborough was clothed with such discretion in the control and improvement of its streets; and if damage come to the plaintiff by reason of acts done by it, neither negligently nor maliciously and wantonly, but in good faith, in the careful exercise of that discretion, it is *damnum absque injuria*. *Smith v. Corporation of Washington*, 20 How. 135; *Brush v. City of Carbondale*, 78 Ill. 74; *City of Pontiac v. Carter*, 32 Mich. 164.

It is not to be denied that the abutting proprietor has rights as an individual in the street in his front, as contradistinguished from his rights therein as a member of the corporation, or one of the public. The trees standing in the street along the sidewalk are, in a restricted sense, his trees. If they are cut or injured by an individual who has no authority from the city to cut or remove them, he may recover damages of such individual. His property in them is such that the law will protect it from the act of such a wrongdoer and trespasser. *Bliss v. Ball*, 99 Mass. 597, and *Graves v. Shattuck*, 35 N. H. 257, are illustrations of this principle. In the former case, the court, speaking of the injury done by defendant to the trees in the street in front of plaintiff's lot, said: "If the

defendant thought they were a nuisance, he might have complained to the selectmen, and it was for them to decide the question whether they should be removed. * * * The defendant had no authority to remove them, nor were the jury authorized to decide the question whether they ought to remain." And thus that authority seems abundantly to sustain the position that it is not for a court and jury to review the conduct of the proper municipal authorities in such a matter as that now under consideration. In *Barnes v. District of Columbia*, 91 U. S. 540, it is said: "The authorities state, and our own knowledge is to the effect, that the care and superintendence of streets, alleys, and highways, the regulation of grades, and the opening of new and the closing of old streets, are peculiarly municipal duties. No other power can so wisely and judiciously control this subject as the authority of the immediate locality where the work is to be done."

The wisdom of this rule is well illustrated by this action. Complaints were made, it seems, by citizens, that these trees were injurious to the public way, and in their effects, perhaps, to the public health. The proper authorities of the city, clothed with the power to repair the streets and protect the public health, listened to these complaints, and in the exercise of their best judgment, so far as appears, decided that the interest of the community required their removal. The proposition of the plaintiff is that a jury shall judge of the correctness of this conclusion, and if they find that the officials committed what they think was an error, they and the city shall be mulcted in damages. "The maintenance of such an action would transfer to court and jury the discretion which the law vests in the municipality; but transfer them, not to be exercised directly and finally, but indirectly and partially, by the retroactive effect of punitive verdicts upon special complaints." *Cooley, Const. Lim.* (6th Ed.) 255. *Phifer v. Cox*, 21 Ohio St. 248, which plaintiff's counsel cited in their brief, related to a county road, and the alleged wrongful cutting of plaintiff's hedge was done by a private citizen. So it has no application, we think, to this case, and belongs to the same class of decisions as *Graves v. Shattuck* and *Bliss v. Ball*, supra. *Bills v. Belknap*, 36 Iowa, 583 (also cited), relates to the cutting down of trees standing in a highway in the country, and the action was to restrain the supervisor of the road. In *Everett v. City of Council Bluffs*, 46 Iowa, 66 (also relied on by plaintiff), which was a suit to enjoin the defendant from cutting down certain shade trees in front of plaintiff's lot, the petition alleged that the trees were "perfectly safe and sound, and afforded no obstruction to the free use of the street and sidewalk," and stated reasons why they should not be removed. The defendant made no answer, and, as the court said, the allegations of the petition were taken as true; and so it ap-

peared, by the admission of the defendant, that its officers were about to do, under its orders, a wrong to the plaintiff, which, because it conceded that the public interest did not in any way require it to be done, would be wanton and unnecessary. We think that case is clearly distinguishable from the one now under consideration. The principles which govern in this matter are well stated in *Chase v. City of Oshkosh*, 81 Wis. 313, 51 N. W. 560,—an action for damages for cutting down shade trees, very similar to the one we are considering,—from which we make the following quotation: "The right of the public to the use of the street for the purposes of travel extends to the portion set apart and used for sidewalks, as well as to the way for carriages, wagons, etc., and, in short, to the entire width of the street upon which the land of the lot owner abuts. As against the lot owner, the city, as trustee of the public use, has an undoubted right, whenever its authorities see fit, to open, and fit for use and travel, the street over which the public easement extends, to the entire width; and whether it will so open and improve it, or whether it should be opened or improved, is a matter of discretion, to be determined by the public authorities to whom the charge and control of the public interests in and over such easements are committed. With this discretion of the authorities, courts cannot ordinarily interfere, upon the complaint of the lot owner, so long as the easement continues to exist. * * * The public use is the dominant interest, and the public authorities are the exclusive judges when, and to what extent, the streets shall be improved. Courts can interfere only in cases of fraud and oppression, constituting manifest abuse of discretion. It necessarily follows that, for the performance of this discretionary duty by the city officers in a reasonable and prudent manner, no action can be maintained against the city."

Having shown, as we think, that the plaintiff cannot recover of the city, we come to consider her second proposition,—that she can recover damages of "the other defendants, King and Scott, not as the servants or agents of the city, but as independent tortfeasors," as it is stated in the brief of her counsel. In other words, it is proposed that the cause of action, as against the city, shall be abandoned, and the cause proceed against the other defendants, upon the theory that they had no authority from the city to do the act complained of. We think the power given to the city over the streets could be delegated to a street committee composed of members of the board of aldermen, as this one was; that this action was the action of that committee, and therefore of the city; and that just as these individuals would have been answerable in damages to the plaintiffs, if the act had been beyond the power of the municipality, so they are not liable if the act was within those powers. All went to show

that the individual defendants were acting as agents and officers of the city. They so assert. The city so insists, and distinctly ratifies their act. Therefore, as the city has done no legal wrong, neither have they. Affirmed.

AVERY, J. (dissenting). It is always safe to recur to fundamental principles. It is perilous to refrain from going to the fountain head, where the controversy arises out of an attempt of a public agency to use or destroy, without compensation, what is claimed to be private property. The very question involved in the case at bar is, what are the rights, respectively, of the servient and dominant owners,—the town and the abutting proprietor in a street,—what passed to the public with the easement, and what residuary interest remained in the owner after the appropriation by the municipality for corporate purposes? The taking of private property for a public highway, like any other exercise of the right of eminent domain, can be justified only on the ground of public necessity,—that it is essential in order to subserve the convenience or promote the prosperity of the great body of people, comprehended under the general designation of the “public,” to give them the use of it for certain specified purposes. *Cooley*, Const. Lim. 643. Where an easement is acquired, whether by grant, dedication, or condemnation, nothing more passes to the public than the power to use the land strictly in furtherance of the objects for which the legislature authorized its appropriation. Except in so far as his right of enjoyment is restricted by the inhibition against his interference with its use for the particular public purposes, all of the rights of ownership are still retained by the holder of the servient tenement. The other estate dominates and overshadows his right only so far as is necessary to subserve the ends for which its privilege has been granted. The residuary rights of the abutting owner in a street are somewhat more restricted than those of an adjacent proprietor in a public road, because, in contemplation of law, the damages for the taking are measured by the extent of the public use, and the consequent limitation of private enjoyment by the servient owner.

I may safely lay it down as a general proposition that, when the legislature permits private property to be taken by a public or quasi public corporation, the state intends that it shall be appropriated only for corporate purposes,—such uses as may be necessary in order to enable the public agency to perform its duties to the state, and enjoy the compensatory privileges granted to it. Whatever rights of property in streets do not pass, from the very nature of a municipality, as necessary to the discharge of its public functions, or as inseparable incidents to the franchise granted, remain in the abutting proprietor, reserved by implication of

law for his benefit, whether the city or town has acquired the fee or an easement, either by grant, dedication, or condemnation, and whether the line of such abutting owner extends to the margin or middle of the street. The abutting proprietors have a qualified property in a street, which entitles them to make “any beneficial use of the soil of such highway which is consistent with the prior and paramount rights of the public therein for street purposes proper.” 2 Dill. Mun. Corp. § 656b. “If they own the fee to the center line of the streets,” says Judge Dillon, “their rights therein are legal in their nature. If they own the fee to the line of the streets, their rights in the street are in the nature of equitable easements in fee, but, in extent, are substantially the same as when the fee is in them, subject to public use.” Id. §§ 663, 664, 661; *Bliss v. Ball*, 99 Mass. 597. “Where one’s land is bounded on a public highway,” says Judge Cooley in his work on Torts (page 318), “it presumptively extends, not to the outer line, but to the middle of the road; and his supreme dominion embraces the whole, qualified only by the public easement.” In this respect there is a striking analogy between abutting and riparian owners of the fee, in that a certain incidental, qualified property attaches in the highway, whether it be a public road or navigable water. *Bond v. Wool*, 107 N. C. 139, 12 S. E. 281; *Yates v. Milwaukee*, 10 Wall. 497. The street consists of the carriage way and sidewalk, the enjoyment and use of both of which are recognized by the courts as the right of the abutting proprietor, of which he cannot be deprived by the municipality, or even by the legislature, without his consent, and without adequate compensation. *Moose v. Carson*, 104 N. C. 431, 10 S. E. 689; *State v. Brown*, 109 N. C. 805, 13 S. E. 940. A municipal corporation, though authorized by statute to widen streets, can do so only where some mode of ascertaining the damage done by taking additional land, and of enforcing its payment, is prescribed by law, and pursued by the corporation. On the other hand, a city or town has no right to sell a portion of a street in front of an abutting owner, or to diminish its width in any way, without compensation, and contrary to his wishes. *Moose v. Carson*, supra. It being conceded that the abutting owner has a qualified property in the street on his front, the only safe criterion by which to test the justice of a claim to any specified right is the consistency or inconsistency of its exercise with the use of the highway by the municipality for corporate purposes. The original owner of the soil surrenders his absolute property in his frontage for a qualified one, in full contemplation of the authority of the corporation, whenever it may become necessary, for public purposes, either to elevate or lower the level of the street, though he may suffer some inconvenience from any alteration of

the grade; and consequently it is supposed that such damage was considered when the cost of the easement was estimated and paid, or that a donation was made, subject to the contingency of suffering such loss. Guided by the principle stated, this court held that, for loss caused by excavation on embankments made in changing the grade of a street, the abutting owner could not recover, unless the injury was directly due to want of skill or negligence in the excavation of the work. *Meares v. Wilmington*, 4 Ired. 73; *Wright v. Wilmington*, 92 N. C. 156. In such cases it was considered that the alteration in the highway was not a new taking, but a use of it that was in contemplation at the time when the easement passed to the public. *Cooley, Const. Lim.* p. 671; 2 *Dill. Mun. Corp.* § 992, and note. Even this rule, however, has proven so oppressive in practice as to lead, in some of the states, to the enactment of statutes and the amendment of constitutions so as to create a liability as for an original taking, when there is a change of grade, such that damage ensues to an adjacent proprietor. *Lewis, Em. Dom. c. 8*, especially section 221. "The public," says Mr. Lewis, "acquire no right in the use of springs in the highway, and cannot divert them for the purpose of making a public watering place. The owner of the fee cannot change the location of the road where it crosses his land. He may deposit materials on the surface of the way, plant shade or ornamental trees therein, set hitching posts, etc. * * * The public cannot place structures on the soil which have no connection with its use as a highway." *Lewis, Em. Dom.* p. 759; *Deaton v. County of Polk*, 9 Iowa, 594. "Subject to the paramount right of the public, the rights of the owner of the fee remain the same as though the public easement did not exist. * * * As against the public, he may make any use of the land which does not interfere with the use and enjoyment of the same as a highway." *Lewis, Em. Dom.* p. 758, § 589. The learned author claims for the owner of the fee the right to plant trees in the highway, both for shade and ornament; and it cannot be denied that he acquires a qualified property in the fruit of his labors, when they grow so as to subserve his purpose. It is conceded to be the law in North Carolina that such shade trees can be cut down by a city when the grade is changed, because they are planted in contemplation of the principle that the power to grade is a continuing one, and that, "of the necessity or expediency of its exercise, the governing body of the corporation, and not the courts, is the judge." 2 *Dill. Mun. Corp.* § 686, and note. But though a tree be planted subject to the right of the city to destroy it, in the exercise of this continuing power to improve its streets, it is nevertheless the property of the owner of the fee; and, when no change of grade is ordered, the governing authori-

ties of the town have the right to remove it only on the ground that it obstructs the highway, and is therefore a public nuisance, or after condemnation, and the payment of compensation ascertained in a mode pointed out by law.

Mr. Wood, in his work on Nuisances (section 294), not only agrees with such other able and discriminating text writers as Judge Dillon, in declaring that the adjacent owner has a property in trees planted in his front, but in maintaining that the municipal authorities are responsible if they deal with them as nuisances, when in fact they do not interfere with the ordinary use of the streets and sidewalks. He says: "Shade trees set in a street or highway without authority of law, which in any measure obstruct travel, are a nuisance. * * * But they can be removed only by the owner or the public authorities, and, if they [the public authorities] remove them when they do not obstruct travel, they are liable to the owner in damages therefor." See, also, *Clark v. Dasso*, 34 Mich. 86. If damage can be recovered, it must, ex necessitate, be assessed by a jury, since it will not be contended that it is a taking in the exercise of the right of eminent domain, for which the law provides any other mode of fixing the compensation. Thus, we find that all of the leading text writers concur in construing the decisions which I cite to sustain my view, and to have settled the principles in this country, generally, that a shade tree is the property of the abutting owner, which cannot be destroyed, as a nuisance, unless it hinders the free use of the highway by the public, and where it is not an obstruction the owner may recover damages of the authorities of a city for its wrongful removal. In treating of the power to prevent and abate nuisances, Judge Dillon says: "This authority, and its summary exercise, may be constitutionally conferred on the incorporated place, and it authorizes its council to act upon that which comes within the legal notion of a nuisance; but such power, conferred in general terms, cannot be taken to authorize the extrajudicial condemnation and destruction of that, as a nuisance, which, in its nature, situation, or use, is not such. * * * It is a doctrine not to be tolerated in this country that a municipal corporation, without any general laws of the city or of the state, within which a given structure can be shown to be a nuisance, can, by the mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself." 1 *Dill. Mun. Corp.* § 374; *Everett v. City of Council Bluffs*, 46 Iowa, 66; *Yates v. Milwaukee*, 10 Wall. 498; *State v. Mayor*, 29 N. J. Law, 170; *Cooley, Const. Lim.* 242, 741, note; *State v. Mott*, 61 Md. 297; *Ward v. City of Little Rock*, 41 Ark. 526; *Northwestern Fertilizing Co. v. Village of Hyde Park*, 70 Ill. 634; *Horr. & B. Mun. Ord.* § 252.

If the destruction of the trees, complained

of, is to be imputed to the defendants, it is not contended that there was any other law authorizing the act than the general authority to prevent nuisances. Whether a city acts, in such a case as this, under the general power to abate nuisances, or under special authority to remove obstructions, the rule is the same. "Power to a city, by its charter, to regulate the use of streets and alleys, and to prevent and remove obstructions from them, contemplates the preservation of actual ways against nuisances which interfere with their accustomed use, and until they have become actually open obstructions thereon, under a claim of title apparent on the face of the prosecution, cannot be punished under an ordinance in the municipal tribunal, but the rights of the parties must be determined in the public courts." 2 Dill. Mun. Corp. p. 809, § 680, and note; *Jackson v. People*, 9 Mich. 111; *Phifer v. Cox*, 21 Ohio St. 248. While, in the exercise of the continuing authority to raise or lower the grade of streets, the law requires of the city only good faith, care, and skill, the arbitrary destruction of property, or what is equivalent to its confiscation, cannot be justified on the ground that the act was done under the honest belief that it was a lawful abatement of a nuisance, because it obstructed the highway. If the tree was property, and was not planted in contemplation of legal authority in the city, express or implied, to cut it down at will, but only in view of the possibility of its destruction as a nuisance, then, unquestionably, the plaintiff would have the right to have any disputed facts, such as the question where the tree was standing, tried by a jury, with instruction from the court as to what constituted nuisance such as the city might summarily abate. Good faith will not protect an officer who commits a trespass without the color of authority, and thereby leave remediless one whose property is destroyed without reason or necessity. *Elliott, Roads & S.* p. 521. An obstruction is defined as "anything which, without reasonable necessity, impedes the use of the streets for lawful purposes." *Horr. & B. Mun. Ord.* § 230. "When adjacent owners retain the fee in the streets, the corporation has no right to destroy the trees, unless they grow within the street, or so as to obstruct traffic." *Id.* § 229; *Bliss v. Ball*, 99 Mass. 597; *White v. Godfrey*, 97 Mass. 472; *Tainter v. Mayor*, 19 N. J. Eq. 46; *Cross v. Mayor*, 18 N. J. Eq. 313; *Bills v. Belknap*, 36 Iowa, 583; *Everett v. City of Council Bluffs*, *supra*. Whether trees in a public highway are a public nuisance "is a question of fact for the jury," in all cases. *Phifer v. Cox*, 21 Ohio St. 248. If an overseer cuts down a tree which does not obstruct or interfere with the public use of the road, he is a trespasser, and, if he does so maliciously, is liable to exemplary damages. *Winter v. Peterson*, 24 N. J. Law, 524.

The case of *Chase v. City of Oshkosh* (Wis.) 51 N. W. 560, 6 Am. R. & Corp. Cas. 1, may

appear, upon first view of it, to be in conflict with the general current of authority, and with the cases we have cited, some of which are collated in a note appended to it; but, upon a closer examination, it will appear that the opinion rests upon the ground that the common council are, by special provisions of the charter, to "protect the streets from any encroachment or injury," and "to prevent, prohibit, and cause the removal of all obstructions in and upon all streets in said city." The charter of the city of Greensborough provides for condemnation of property for the purpose of changing or widening the streets already in existence, and laying out new ones, but we find no special warrant for assuming the judicial function of declaring any obstruction in the whole street a nuisance. If the legislature had constituted the mayor and commissioners, or the street committee selected by them, a special court, and had empowered them to remove obstructions which, in their judgment, were nuisances, we would still have been compelled to meet the question whether the legislature could in that indirect way clothe the officers of a municipality with the authority to destroy such private property, and deprive the sufferer of the right to "the ancient mode of trial by jury," guaranteed to him, "in all controversies respecting property," by the constitution (article 1, § 1), unless the trees had been planted in contemplation of an express power conferred upon the town council to clear all parts of the streets of trees. This grave question does not arise in this case, and the discussion of it is therefore unnecessary. When the point shall be properly presented, it will be necessary to determine whether the legislature can dispense with the right of trial by jury in any case involving the title to property, when the litigant could have claimed it under the ancient common law.

It seems that in the recent case of *O'Connor v. Telephone Co.*, 13 Can. Law T. 336, the appellate court of Nova Scotia has held that the rights of the abutting owner of the fee on a street extended to the middle of the highway, in his front, and that he had a property in ornamental shade trees in the street, in his front, and could maintain an action against a telephone company for damages (to be assessed, of course, by a jury) for mutilating such trees. Says Lawson (*Rights, Rem. & Pr.* vol. 3, p. 1758): "Adjacent landowners may lawfully use the space between the carriage path and sidewalks for the growing of trees for ornament or use. Trees thus situated are in no sense nuisances, but private property." But the right of property stands upon the more substantial ground of inexorable reason, since the city does not appropriate the space between the sidewalk and the street for corporate purposes, and the residuary right of the owner of the fee empowers him to use it. Even where the right is in the domi-

nant owner to extend its actual dominion, if it become necessary, no such summary destruction without reason is permitted. Where the fee is condemned for a railway for a distance of 100 feet on either side of the track, while the corporation may build an additional track, if requisite for the transaction of its business, at any time during the period of its corporate existence, or may erect structures for corporate purposes upon the land appropriated, yet if the adjacent owner plant and raise corn within the limit of 100 feet, but not upon the portion of the way actually occupied by the company, the law neither imposes the duty, nor confers the power, on the latter, to cut down such corn, as a nuisance, because it may obstruct the view of the engineer, and prevent him from seeing cattle approaching the line of railway. *Ward v. Railroad Co.*, 109 N. C. 358, 13 S. E. 923; *Id.*, 113 N. C. 566, 18 S. E. 211. On the other hand, the corporation may, in that case, remove trees, because that is authorized by statute, lest they become a nuisance, by falling upon the track. But the facts are found, and in our opinion the tree was not shown to be a public nuisance, subject to summary removal by the city, but was the property of the plaintiff, for the willful destruction of which an action for damage lies against the trespassers, and those under whose authority they may have acted. There was no pretense of a condemnation for a public purpose, or of authority to take, if it was private property, other than in the mode pointed out in section 60 of the charter,—upon a valuation by three freeholders. There was no evidence that the trees were unsound, so as to endanger the safety of travelers on the highway, and there was no provision of law, in or out of the charter, authorizing the cutting down of trees located on the margin of the sidewalks, or at any point on the streets, to avert danger to the public. The authority to make improvements, given in a charter, like that to widen the streets, was coupled with the condition that commissioners should be appointed to assess any damage that might be caused by the changes made. In the case at bar the court found as a fact that the trees did not obstruct the sidewalk, and, in effect, that they were not nuisances, and, therefore, that there was no authority for destroying them. When such shade trees neither impede the passage of vehicles, nor unreasonably obstruct the sidewalks, the municipal authorities may enact general ordinances to protect them, even against wanton injury or destruction by the owner, but are not empowered, by orders or by-laws, to cause them to be removed, as nuisances, when, in law and in fact, they are not nuisances. *Horr. & B. Mun. Ord.* §§ 252, 229; *McCarthy v. Boston*, 135 Mass. 197; *Wood, Nuis.* § 294. An adjacent owner, notwithstanding an order or ordinance of municipal authorities authorizing it, is entitled to re-

cover damages for any invasion of his individual rights, such as the destruction of shade trees in his front, when they do not interfere with the use of the highway for any public purpose whatever. *Horr. & B. Mun. Ord.* § 7; *Bliss v. Ball, supra*; *Wood, Nuis.* § 294; *Elliott, Roads & S.* p. 536. And the destruction of shade and ornamental trees located in a public highway in front of the premises of the abutting owner has been held to be an irreparable injury to him, and for that reason has been enjoined, where their removal was not necessary to the enjoyment of the easement by the public. *Tainter v. Mayor*, 19 N. J. Eq. 46; *Cross v. Mayor*, 18 N. J. Eq. 305; *Bills v. Belknap*, 36 Iowa, 583. "As owner of the fee," says *Elliott (Roads & S. 536)*, "subject only to the public easement, the abutter [who owns the fee] has all the ordinary remedies of the owner of a freehold. He may maintain trespass against one who unlawfully cuts and carries away the grass, trees, or herbage, and even against one who stands upon the sidewalk in front of his premises, and uses abusive language towards him, refusing to depart." *State v. Davis*, 80 N. C. 351.

If the shade trees in front of the plaintiff's house were not a nuisance at common law, nor so declared by statute, no ordinance or proceeding of the municipal authorities, or their agents, could justify their destruction, in the face of the objection of the plaintiff's husband. *Miller v. Bureh*, 32 Tex. 208; *Yates v. Milwaukee, supra*; 1 *Dill. Mun. Corp.* §§ 374-379; *Everett v. City of Council Bluffs*, 46 Iowa, 66; *Cooley, Const. Lim., supra*; *Northwestern Fertilizing Co. v. Village of Hyde Park, supra*. The three oak trees cut down by the street force, in obedience to the command of the defendant's street committeemen, *King and Scott*, after securing the approval of *Mendenhall*, of the same committee, stood at the outer edge of a sidewalk eight feet wide, and within the line of the curbing, and, being directly in front of the plaintiff's dwelling house, contributed to the comfort of its inmates. The space between the trees and the inner line of the sidewalk was not uniform in width. It averaged eight, but was at no point less than seven, feet in width, and was found by the court to be sufficiently wide to afford "room for persons to pass in the usual manner without inconvenience." The judge below found, also, that "the leaves on said trees obstructed the rays of the sun, and so shaded the street as to cause it to be and continue damp for a portion of the time." The finding excludes the idea that the trees were a nuisance, in obstructing the sidewalk; and the mere fact that the shade was so dense as to cause occasional dampness under it is not satisfactory evidence that they so interfered with the use of the street as to constitute them a nuisance. *Bliss v. Ball, supra*. It is a matter of common observation that all trees which subserve the purpose of shading the

ground prevent the earth, within the line of their shadows, from becoming dry so soon as the surrounding space. And the commissioners were not authorized, because they had created a stench by filling a hole near the trees with green limbs, to declare them a nuisance, as the cause of the offensive odor, since the court finds that, after removing them, the municipal authorities, by filling the hole with stone, put the street in good condition, and that this remedy could have been effectually used without molesting the trees at all. So far from showing that the removal was demanded for the benefit or convenience of the public, the conclusion of fact submitted by the court sustains the contention of the plaintiff, that, being within the curbing (but seven feet or more from the fence), the trees neither obstructed the sidewalk, nor the 23 feet of carriage way; that the hole could and would have been filled with stone or earth; and that, if the dampness under the dense foliage of the trees made them a nuisance, every shade tree that subserves the purpose of planting it, if it casts a shadow upon a highway, would be liable to destruction at the arbitrary bidding of any agent of a town who might be intrusted with the duty of repairing its streets. *Lawson, Rights, Rem. & Pr.* p. 175S, § 1033. The statutes which in some states protect such trees are in affirmance of the principle that the owner surrenders to the public only such dominion over the land as he could not exercise without interfering with the easement of the public for use as a highway. The admitted right of the abutting owner, under the common law, to the herbage, and to sue, or sometimes cause to be indicted and punished criminally, for a forcible trespass committed on the highway in his front, is an illustration of this well-established principle.

It is urged, however, on behalf of the city of Greensborough, that it cannot be held answerable for the trespass committed under the direction of the defendants King and Scott, because it appears that "no action was taken, or order made, by the board of aldermen, in respect to the removal of the trees, nor was any report made by the street committee to the said board with regard to their action in the premises." It was provided in section 12, c. 1, of the City Ordinances, that a number of committees, composed of four aldermen each, should be appointed from the members of the board to take charge of certain departments of the municipal government; and among them was that composed of defendants King and Scott, and Aldermen Glenn and Mendenhall, who, by the terms of the next section, were intrusted with the "control and supervision of all matters relating to the streets, sidewalks, and pumps of the city," etc. This appointment, without any further recognition of their acts, constituted King and Scott the agents of the city for the supervision of the streets, and

all that could be done for the improvement and reparation of them. 2 Dill. Mun. Corp. 979, (777). "Towns, counties, villages, and cities must respond for such torts of their officers, agents, and servants as have been suffered or committed by corporate authority." *Cooley, Torts*, p. 122. As agents, the relation of the members of the committee to the town was legally the same as that of any servant to his master; and the responsibility of the municipality, as superior, is likewise governed by the rules applicable to such relation. Where a trespass is committed in the course of the employment of an agent or a servant, and is intended and believed by the trespasser to operate for the benefit of his superior, though it may be willful, such superior is none the less answerable for damages. 1 *Shear. & R. Neg.* § 151; *Cooley, Torts*, p. 536; 4 *Am. & Eng. Enc. Law*, pp. 252, 253, note 1; *Johnson v. Barber*, 5 *Gilman*, 425; *Limpus v. Omnibus Co.*, 1 *Hurl. & C.* 526. "If, in exercising its power to open or improve streets, or to make drains or sewers, the agents or officers of a municipal corporation, under its authority or direction, commit a trespass, or take possession of private property, without complying with the charter or statute, the corporation is liable in damages therefor. In such cases, also, an action will lie against a city corporation by the owner of land through which its agents have unlawfully made a sewer, or for trees destroyed and injuries done by them." 2 *Dill. Mun. Corp.* § 974 (772). "Where the working and repair of streets is treated [as in North Carolina] as a municipal duty, and the officer in charge as a corporate, in distinction from an independent, public officer, or where the injury was negligently caused by such officer in the process of executing upon the streets an authorized corporate improvement or work for them, the doctrine of respondeat superior would apply." *Id.* §§ 979 (777), 980 (778), 983. If, then, the city was acting through the members of the committee, as its agents, it was in the exercise of its ministerial or corporate, as distinguished from its judicial, legislative, or discretionary, duties, and was therefore answerable, as superior, for such acts, done in the course of their employment, as were manifestly intended to inure to the benefit of the corporation. *Moffitt v. Asheville*, 103 *N. C.* 237. 9 *S. E.* 695; *Cooley, Torts*, pp. 619, 622. The implication from the finding of the court, if that was necessary, is that the committee "concur in the conclusion that the trees should be removed" in order to improve the street, and that King and Scott, as aldermen, intended to benefit the corporation when they directed the street force to do the work. They then sustained the same relation to the municipality that a conductor or other agent bears to a quasi public corporation, such as a railroad or street-car company; and it is well settled by numberless cases that, though the agent or servant of such corpora-

tions may willfully commit a trespass in the course of his employment, yet if the act is done with the belief that it will benefit the principal or master, and the intention to advance its interest, the principle of respondeat superior applies. *Moore v. Railroad Co.*, 4 Gray, 465; *Shea v. Railroad Co.*, 62 N. Y. 180; *Seymour v. Greenwood*, 6 Hurl. & N. 359; 1 *Shear. & R. Neg.* § 150; *Cooley, Torts*, pp. 533-537; *Limpus v. Omnibus Co.*, supra; *Pol. Torts*, p. 15.

But not only is the corporation responsible for acts done by its agents in the execution of the duties assigned to them, but a joint action for the tort will lie against the company and the servant. *Hewett v. Swift*, 3 Allen, 420; *Johnson v. Barber*, supra; *Wright v. Wilcox*, 19 Wend. 343. The law is founded upon the highest conceptions of natural justice. It is impracticable for a mayor and board of commissioners to move in a body along every street of a city, and sit in judgment upon the proposed removal of a tree. A city must work through agents constituted by its governing authorities; and, when an agency is intrusted to a street committee, there is no principle of law, reason, or justice that will relieve the municipality of liability for their torts, when engaged in the business intrusted to it, because the committee did not desist on an objection to the removal of the tree, stop the street force from work, and call a meeting of the council to authorize or ratify the act. The town, when engaged in the improvement of its streets, or in the performance of any act intended for the benefit of the municipality, is liable both for the negligence and willful torts of its agents, just as when an officer or servant of a quasi public corporation commits little overt acts, or negligently omits to discharge his duty, he subjects the company that he represents to liability for consequent injury. *Moffitt v. Asheville*, supra; *Cooley, Torts*, p. 619. If a director of a railroad company were appointed to act as conductor, the company could not escape liability for removing a passenger on the ground that, by disorderly conduct he had been guilty of nuisance, when in fact his acts did not justify the conductor in ejecting him. The committee were not the less agents of the town council because they were selected from the body itself. It is a well-known fact that the governing authorities of our towns, usually, if not universally, intrust the management of improvements, not involving the condemnation of private property, to committees selected from their own bodies. To absolve the towns from liability for a trespass committed by such agents, or under their direction, for the benefit of the corporation, when, in many cases, such committeemen are irresponsible primarily, would be to countenance oppression, and, in some instances, what would be equivalent to confiscation. An ordinance provided that the street committee "shall have control and

supervision of all matters relating to streets, sidewalks, and pumps, and shall determine the amount of labor and material to be used, * * * and shall report to the board from time to time, and perform the duties imposed upon them by the board of aldermen." Would the ordinary regulation that a conductor should report to the president of the company, or superintendent, the fact that he had ejected a passenger, excuse the company from responsibility for injury caused by a wrongful expulsion? When acting for its own benefit, a municipality stands upon precisely the same footing, as to liability for the acts of its agents, as does a quasi public corporation. See *Moffitt v. Asheville*, supra, and authorities cited. Suppose such a corporation should, by means of a by-law, declare the conductor, engineer, baggage master, and flagman a committee to have control of the question of ejecting drunken or disorderly passengers, or such as failed to secure tickets or pay fare. Would the corporation be allowed to evade liability for the wrongful, willful, and violent expulsion of a passenger by the conductor and baggageman after consulting the flagman, because the engineer did not approve the act till it was communicated? *Cooley, Torts*, p. 539. To apply the same principle to such agencies as govern in questions of the right of the directors of private corporations to bind their companies would be the entering wedge to the destruction of all corporate liability for the torts of agents and servants. Means would be found, by ingenious regulations, to leave the public at the mercy or caprice of irresponsible and reckless agents and servants, were the possibility of putting the corporation behind such bulwarks once suggested. The right to trial by jury is none the less a constitutional right because juries are sometimes misled by prejudice. The corrective for such an evil, if it exists, is the enactment of statutes requiring greater care in their selection, not judicial legislation restricting the operation of the original law. Says Judge *Cooley* in his work on *Torts* (page 122): "Towns, counties, villages, and cities must respond for such torts of their officers, agents, and servants as have been committed or suffered by corporate authorities." "It is not merely for the wrongful act that the agent or servant is directed to do, but the wrongful act he is suffered to do, that the city is responsible." *Id.* p. 534. It was the duty of the city to see that its agents were attentive and prudent, and so conducted its business as not needlessly to injure others. *Com. v. Nichols*, 10 Mete. (Mass.) 259. The law presumes that the city looks after its street force; and the fact that it was engaged, two or three days after the order was given by *Scott and King*, in removing the trees, is evidence that the mayor and commissioners knowingly suffered the removal to be made. They knew, or ought to have known, what

these paid laborers were doing. I think, therefore, that there was error in the ruling of the court below that the action could not be maintained either against the city, or the two aldermen in their individual capacity. The two aldermen were guilty of a willful trespass, for which the corporation became liable, because it was committed in the attempt to discharge their duty to the corporation, as agents named in the ordinance, and with the intent to improve its streets. The act being willful, the agents were not relieved of responsibility because the principals were made answerable. The committee were not a corporation, but were the authorized agents of the town; and it was not essential that they should meet, like stockhold-

ers, at an appointed time or place. The question is not whether they could bind a municipality by a contract, but whether, as its servants acting within the line of duty prescribed for them, they could make the city a joint tort feisor with them. It was sufficient, I think, that a majority agreed upon a certain course of conduct, and their purpose was carried out by the laborers at the bidding of two of the number, and they were not acting in strict conformity, as stockholders, to the terms of a charter, but were agents carrying out a common purpose to cause a trespass to be committed.

MacRAE, J. I concur in the above dissenting opinion.

LOVE v. CITY OF ATLANTA.

(22 S. E. 29, 95 Ga. 129.)

Supreme Court of Georgia. Dec. 4, 1894.

Error from city court of Atlanta; Howard Van Epps, Judge.

Action by W. A. Love against the city of Atlanta. Defendant had judgment, and plaintiff brings error. Affirmed.

Dorsey, Brewster & Howell, for plaintiff in error. J. A. Anderson and Fulton Colville, for defendant in error.

ATKINSON, J. Love brought against the city of Atlanta an action for damages, alleging, in substance, that while he was passing along the streets of the city, in the exercise of proper care, without fault upon his part, by, through, and because of the negligence of a servant of the defendant, an animal attached to one of the garbage carts of the city was permitted to run away, and while so running collided with the buggy of the plaintiff, causing serious injury. It was also alleged that the driver of the cart was a small negro boy, wholly incompetent to the discharge of the duty, and that the mule employed was vicious, dangerous, and liable to run away. The evidence proved the plaintiff's cause of action as laid in the declaration, and in reply it was shown that the mule and cart causing the damage were in use by the city under the direction of the health board of the city, and that the servant of the city charged with driving said cart was then employed in cleaning the streets, and removing therefrom such putrid and offensive substances as usually accumulate in the streets of densely populated cities, and which were necessary to be removed, because, remaining, they endangered the public health. At the conclusion of the evidence the trial judge directed a verdict for the defendant, instructing the jury that, inasmuch as the uncontroverted testimony showed that the injury complained of was inflicted by servants of the city employed by that department of the city government whose duty it was to look after and preserve the public health, and inasmuch as it appeared that this injury was inflicted by the defendant's servants while engaged in the performance of work essential to the discharge of that particular duty, the city was not liable, and they should return a verdict for the defendant. Exception is taken to this instruction, and we are now to consider whether the court erred. Distinctions do not appear to have been at all times accurately drawn between the classes of cases in which a municipal corporation would be liable and those in which it would not be liable for the misfeasance or nonfeasance of a public servant employed under municipal authority in the discharge of duties relating to corporate affairs. One general proposition, how-

ever, seems to have received general recognition at the hands of courts of last resort wherever that class of cases has been considered, and that class of cases is that, where an injury sustained is inflicted because of the misfeasance of an agent of a corporation while engaged in a duty pertinent to the exercise of what are termed "governmental functions of a corporation," the city is not liable. Where injuries under similar circumstances are inflicted by the agent of a corporation acting for it in the discharge of a duty on behalf of a municipal corporation where it is engaged in the exercise of some private franchise, or some franchise conferred upon it by law which it may exercise for the private profit or convenience of the corporation or for the convenience of its citizens alone, in which the general public has no interest, for such injuries a right of recovery lies against the city. Some difficulty has arisen in the application of these general principles to the facts of particular cases which from time to time have arisen. Some difficulty has arisen in the proper classification of cases in order to assign each to its appropriate position with reference to the liability or nonliability of a corporation, and the courts have not been altogether happy nor entirely consistent at all times in this regard. As an illustration of this, it is held that cities are liable for damages resulting from the nonrepair or from the dangerous condition of public streets, and this in the absence of strict statutory liability imposed by law. It has been held that they are not liable for damages occasioned by their fire departments for injuries to person or property in going to or from fires. The former case is one that might properly have been originally classified among the cases of nonliability. The duty of keeping its streets in repair is a public duty, in which the general public is interested. The state commits to it the discharge of those governmental duties incident to the sovereign power, by which it is required to maintain for the use of the general public and for the public convenience a system of roads throughout the state, and the assignment of this particular duty to municipal corporations within their limits may fairly be said to be a delegation of what appears to us to be one of the functions of the government. The latter case, referring to the fire department, is a case of nonliability, and, if not the exercise of a private power for the benefit of the corporation itself and the inhabitants thereof, in which the general public in no way participates, it reaches the verge upon that line. We cite these as simple illustrations of our statement that the courts have not at all times been consistent, but with no purpose either to disturb the precedents established by repeated rulings of respectable courts of last resort in nearly all the states, or to intimate that there is such a doubt as to their soundness as

would in any sense justify the adoption of other rules. With respect to matters concerning the public health, however, there is no serious conflict of reason, opinion, or authority upon the correctness of the proposition that the preservation of the public health is one of the duties that devolve upon the state as a sovereign power. It is such a duty as, upon proper occasion, justifies the exercise of the right of eminent domain, and the demolition of structures which endanger or imperil the public health. In the discharge of such duties as pertain to the health department of the state, the state is acting strictly in the discharge of one of the functions of government. If the state delegate to a municipal corporation, either by general law or by particular statute, this power, and impose upon it, within its limits, the duty of taking such steps and such measures as may be necessary to the preservation of the public health, the municipal corporation likewise, in the discharge of such duty, is in the exercise of a purely governmental function, affecting the welfare not only of the citizens resident within its corporation, but of the citizens of the commonwealth generally, all of whom have an interest in the prevention of infectious or contagious diseases at any point within the state, and in the exercise of such powers is entitled to the same immunity against suit as the state itself enjoys. Such a duty would stand upon the same footing as its duty to preserve the public peace, and its liability or nonliability would depend upon the same principle which relieves the city from liability for the misfeasance of a police officer in the discharge of his duty. It will be observed, however, that, in order to exempt a city from liability, it is not sufficient to show that the particular work from the negligent performance of which by the servants of the city a citizen was injured was being performed under the direction of the health authorities, but it must be shown that the particular work so being done was connected with, or had reference to, the preservation of the public health. If the health de-

partment were engaged in clearing away or removing obstructions from the street which in no way endangered the public health, the responsibility of the city then would rest upon the rule of liability for the work connected with repairing and keeping in order the public highways. It can make no difference in principle as to the character of the agents employed in the discharge of this duty with respect to the public health. The principle of nonliability rests upon the broad ground that in the discharge of its purely governmental functions, a corporate body to which has been delegated a portion of the sovereign power is not liable for torts committed in the discharge of such duties and in the execution of such powers. It can be no more liable because of the fault to select competent drivers of garbage carts than a city could be held liable for failing to elect a wise, conservative, and discreet mayor.

Let us inquire, then, whether the particular service being performed by this particular servant of the corporation had special reference to the preservation of the public health. The accumulation of garbage, of substances offensive to the sense of smell, of substances which, if permitted to remain, would poison the atmosphere, and breed diseases infectious and contagious among the inhabitants of the city, may well be said to endanger the public health. The preservation of the public health involves the removal of those causes which are calculated to produce disease. According to the undisputed testimony in the case, the driver of this garbage cart and the alleged refractory mule were engaged actually in the removal from the streets of substances similar to those described above. However incongruous it may appear to be to say that this diminutive darkey and this refractory mule were engaged in the performance of some of the functions of government, it is nevertheless true, and illustrates how even the humblest of its citizens, under the operations of its laws, may become, in Georgia, an important public functionary. Judgment affirmed.

SPRINGFIELD FIRE & MARINE INS. CO.
v. VILLAGE OF KEESEVILLE.

(42 N. E. 405, 148 N. Y. 46.)

Court of Appeals of New York. Dec. 19, 1895.

Appeal from supreme court, general term, Third department.

Action by the Springfield Fire & Marine Insurance Company, of Springfield, Mass., against the village of Keeseville. A judgment sustaining a demurrer to the complaint was reversed by the general term (29 N. Y. Supp. 1130), and defendant appeals. Reversed.

Chester B. McLaughlin, for appellant. A. W. Boynton, for respondent.

GRAY, J. The learned justice who spoke for the general term, in a very elaborate and interesting opinion, proceeded, very correctly, as I think, upon the assumption that the negligence charged against the defendant in the complaint related entirely to its waterworks system. In the view which we take of the matter, it is of comparatively little consequence whether the plaintiff based its right of action upon negligence with respect to the fire department as such, or to the water department as such. But the fair reading of the complaint undoubtedly warrants the assumption of the learned justice at general term. If I correctly apprehend the reasoning which led the general term to the conclusion that there was a municipal liability upon an admission of the facts set forth in the complaint, it rests, in the main, upon two theories. In the first place, it is held that, by the voluntary assumption on the part of the defendant of the power conferred by statute to construct and maintain waterworks, it became responsible for the proper exercise of such power, and that such responsibility is necessarily demanded in the interest of an efficient public service, and the inhabitants, who have contributed to the maintenance of such a public work, have a right to hold the defendant to the exercise of reasonable care and diligence and to a liability for a failure to do so. In the next place, it is held, while not seeming that the defendant had engaged in a private corporate business, conducted for its own benefit, and not for the general public, nevertheless that the defendant having agreed to erect and take charge of the public work and enterprise for the public within its boundaries, if there is a failure to exercise reasonable care and diligence in maintaining it, there has been a breach of an implied contract, for which, if injury results, an action will lie. Holding these views, the learned general term felt compelled, because of the admission by the defendant, through its demurrer, of the allegations of wrongful and neglectful conduct in relation to the maintenance of its waterworks, to hold that the plaintiff made out a good cause of action.

The proposition that such a liability rests upon a municipal corporation, as is asserted

here, is somewhat startling, and I think the learned general term justices have misapprehended the nature of the responsibility which devolved upon the defendant in connection with its maintenance of a waterworks system, as well as the character of the power which it was authorized to exercise in relation thereto. I might remark, in the same spirit of criticism which was assumed by the learned justice at general term, that while the efficiency of the public service would be promoted by holding municipal corporations to the exercise of reasonable care and diligence in the performance of municipal duties, and to a liability for injury resulting from a failure in such exercise, the application of that doctrine to such a case as this might, and probably would, be highly disastrous to municipal governments. A little reflection will show that a multitude of actions would be encouraged, by fire insurance companies, as by individuals, and that cases have arisen, and may still arise, where an extensive conflagration might bankrupt the municipality, if it could be rendered liable for the damages or losses sustained. The distinction between the public and private powers conferred upon municipal corporations, although the line of demarcation at times may be difficult to ascertain, is generally clear enough. It has been frequently the subject of judicial discussion, and, among the numerous cases, it is sufficient to refer to *Bailey v. Mayor, etc.*, 3 Hill, 531; *Lloyd v. Mayor, etc.*, 5 N. Y. 369; and *Maximilian v. Mayor, etc.*, 62 N. Y. 160. The opinion in *Darlington v. Mayor, etc.*, 31 N. Y. 164, is also instructive upon the subject. When we find that the power conferred has relation to public purposes and is for the public good, it is to be classified as governmental in its nature, and it appertains to the corporation in its political character. But when it relates to the accomplishment of private corporate purposes, in which the public is only indirectly concerned, it is private in its nature, and the municipal corporation, in respect to its exercise, is regarded as a legal individual. In the former case, the corporation is exempt from all liability, whether for nonuser or misuser; while in the latter case, it may be held to that degree of responsibility which would attach to an ordinary private corporation. Then the investiture of municipal corporations by the legislature with administrative powers may be of two kinds. It may confer powers, and enjoin their performance upon the corporation as a duty; or it may create new powers, to be exercised as governmental adjuncts, and make their assumption optional with the corporation. Where a duty specifically enjoined upon the corporation, as such, has been wholly neglected by its agents, and an injury to an individual arises in consequence of the neglect, the corporation will be held responsible. *Mayor, etc., v. Furze*, 3 Hill, 612, 619. So, in *McCarthy v. City of Syracuse*, 46 N. Y. 194, it was held that, where a duty of a ministerial character is imposed by law upon the corpora-

tion, a negligent omission to perform that duty creates a liability for damages sustained. Such responsibility, however, would not attach to the corporation where it has voluntarily assumed powers authorized by the legislature under some general provision respecting municipalities throughout the state, and permissive in their nature; and at this point I touch one of the theories upon which the general term decision seems to rest. In such a case—and I speak, of course, of legislative acts which are general in their nature and scope—the assumption by the municipal corporation is of a further function of self, or local, government and such a power is discretionary in its exercise, and carries with it no consequent liability for nonuser or misuser. In the legislature reside the power and force of government, confided to it by the people under constitutional restrictions. In the creation of municipal corporations subordinate commonwealths are made, upon which certain limited and prescribed political powers are conferred and which enjoy the benefits of local self-government. *People v. Common Council of Detroit*, 28 Mich. 228. When, in addition to those general powers which are prescribed upon the creation of a municipal corporation, general statutes permit the assumption of further powers as a means of benefiting the portion of the public in the particular locality, they invest the corporation availing itself of the permission with just so much more governmental power. Just as the general powers deposited with the various municipalities are exercised by them in a quasi sovereign capacity, so would any added powers designed for the general public good, though optional with the corporation as to their assumption, and in their exercise and performance local, be exercised. They are not special, as being designed for and granted to a particular municipality; for they are applicable to every part of the body politic where municipal government exists. Such powers, in legal contemplation, appertain to the municipal corporation as such, and may be adopted as a part of the governmental system.

The acts under which the defendant was authorized to construct and maintain a system of waterworks constitute a general law, applicable to all incorporated villages in the state. They impose no duty, and, when availed of, the task undertaken is discretionary in its character. The grant of powers must be regarded as exclusively for public purposes, and as belonging to the municipal corporation, when assumed, in its public, political, or municipal character. In *Bailey v. Mayor, etc.*, 3 Hill, 531, to which reference is made in the opinion below, the city of New York, at a very early day, was authorized by special legislation to engage in the work of supplying its citizens with water and to acquire lands and water rights for the purpose, and, as is clear from the reading of the opinion of Chief Justice Nelson, the city

was regarded in the light of any other private company, because of the special franchises conferred. Assuming that we could regard the doctrine of that case as authoritative at the present day, as to which there has been and might be some question (see *Darlington v. Mayor, etc.*, supra), the decision is inapplicable to the present case. In *Hunt v. Mayor, etc.*, 109 N. Y. 134, 16 N. E. 320, the case turned upon the performance by the city of the duty cast upon it to keep its streets in a safe condition for travel. In *Cain v. City of Syracuse*, 95 N. Y. 83, the discussion was as to the nature of the duty imposed upon the defendant by the power in its charter to pass ordinances, among other things, for the razing of buildings which had become dangerous by reason of fire. The failure of the common council to pass a resolution in respect to the building in question was not deemed to be a neglect of a duty. It was a discretionary matter. Nothing was decided in that case which controls the decision of the present case, or which affects the discussion materially. Nor can we assent to the view that the defendant sustains such an implied contractual relation to the public within its boundaries, with respect to the construction of this public work, as to be responsible for a failure to exercise reasonable care and diligence in respect to its maintenance. If the views which I have somewhat briefly expressed are correct, the defendant exercised a function which, like all governmental functions, was purely discretionary. What it undertook to do, when availing itself of the privilege of the general act, was to provide for the local convenience of its inhabitants.

The industry of the defendant's counsel has collated a great number of decisions, by the courts of other states, which indicate a very general view that the powers conferred by the law of the state upon its municipal corporations to establish waterworks and fire departments are, in their nature, legislative and governmental. From them I may select one or two. In *Edgerly v. Concord*, 62 N. H. 8, it was said by the court: "As a part of the governmental machinery of the state, municipal corporations legislate and provide for the customary local convenience of the people, and in exercising these discretionary functions the corporations are not called upon to respond in damages to individuals either for omissions to act or in the mode of exercising the powers conferred on them for public purposes and to be exercised at discretion for the public good. For injuries arising from the corporation's failure to exercise its public, legislative, and police powers, and for the manner of executing those powers, there is no remedy against the municipality, nor can an action be maintained for damages resulting from the failure of its officers to discharge properly and efficiently their official duties." In *Tainter v. City of Worcester*, 123 Mass. 311, it was said by the court: "The

protection of all buildings in a city or town from destruction or injury by fire is for the benefit of all the inhabitants and for their relief from a common danger; and cities and towns are therefore authorized by general laws to provide and maintain fire engines, etc., to supply water for the extinguishment of fires. The city did not, by accepting the statute, and building its waterworks under it, enter into any contract with, or assume any liability to, the owners of property to furnish means or water for the extinguishment of fires upon which an action can be maintained." In *Maxmillian v. Mayor*, etc., 62 N. Y. 160, the reasoning of the opinion permits a clear inference that this defendant did not, by accepting the provisions of the statutes, assume a duty of the kind which arises from the grant of a special power. Judge Folger uses this language, in his discussion of the two kinds of duties which are imposed upon a municipal corporation: "The former" (referring to the case of a grant of a special power) "is not held by the municipality as one of the political divisions of the state." Again he says: "Where the power is intrusted to it as one of the political divisions of the state, and is conferred, not for the immediate benefit of the municipality, but as a means to the exercise of the sovereign power for the benefit of all citizens, the corporation is not liable for nonuser nor for misuser by the public agents;" citing *Eastman v. Meredith*, 36 N. H. 284. This defendant, precisely, is intrusted with the power to maintain its waterworks, because it is one of the political subdivisions of the state to which the general act has reference in its general grant of power or privilege.

Nor does the fact that water rents are paid by the inhabitants of the defendant affect the question. This fact is made use of to show the private corporate character of the waterworks system, and the suggestion is that profit or benefits accrue to the defendant whereby the corporate undertaking is affected with a private interest. But that is an incorrect notion. The imposition of water rents is but a mode of taxation, and a part of the

general scheme for the purpose of raising revenue with which to carry on the work of government. If profits accrue over the expense of the maintenance of the system, they go to benefit the public by lessening the general burden of taxation. The fallacy, as it seems to me, which affects the argument that the municipal corporation can be made liable for the nonuser or misuser of its power, consists in that it fails to appreciate the true nature of the function which the corporation performs. It adds to its political machinery for the purpose of benefiting and of protecting its inhabitants. There is nothing connected with the work which is not of a governmental and public nature. It is in no sense a private business, and the authority to construct the works was given to it by the legislature, not at its own particular instance or application, but because it was one of the political subdivisions of the state, and, as such, was entitled to exercise it. How could it justly be said that the maintenance of the waterworks system, any more than of a fire department, was a matter of private corporate interest? Is it not for all the inhabitants and for their good and protection? No interest was designed to be subserved other than that of adding to the powers of a community carrying on a local government. If that is true, the alternative is that, being for public purposes, and for the general welfare and protection, the defendant assumed a governmental function, and comes under the sanction of the rule which exempts government from suits by citizens. Further elaboration of the subject is quite possible, but the views expressed seem sufficient to justify the conclusion that the determination reached by the general term was erroneous. The order and judgment appealed from should be reversed, and the judgment entered at the special term should be affirmed, with costs. All concur; BARTLETT, J., upon grounds stated in the opinion, and also upon the further ground that this court decided the principle here involved in *Hughes v. Monroe Co.*, 147 N. Y. 49, 41 N. E. 407. Ordered accordingly.

FIFIELD v. COMMON COUNCIL OF CITY OF PHOENIX.

(36 Pac. 916.)

Supreme Court of Arizona. March 8, 1894.

Appeal from district court, Maricopa county; before Chief Justice A. C. Baker.

Action by George Fifield against the common council of the city of Phoenix. From a judgment for defendant, plaintiff appeals. Affirmed.

Kibbey & Israel, for appellant. L. H. Chalmers, for appellee.

HAWKINS, J. This was an action by appellant to recover damages for personal injuries sustained by him. He based his claim for relief upon the facts that the appellee is a municipal corporation created by an act of the legislative assembly of the territory, approved February 25, 1881, and an act of March 11, 1885, amendatory thereof; that the corporation, in 1889, ordained, among other things, that it should be unlawful for any person within certain city limits, to make any bonfire, discharge any firecrackers, skyrockets, or any fireworks whatever, etc., without first having obtained permission therefor from the city marshal (this ordinance was in effect at the time of appellant's injuries); that on the 15th day of February, 1893, the city, by and through its members, its mayor, and its marshal, unlawfully and negligently granted to certain Chinese permission to set off, discharge, and explode fireworks upon certain streets of said city, within the fire limits; that appellant, a hack driver, on that day, while in the proper pursuit of his business, was driving along the streets of said city; that, while so driving along a street within said fire limits, the Chinese, acting under the permit so granted them, fired off and exploded a large quantity of fireworks, firecrackers, and bombs, whereupon appellant's horses (they being gentle and well broken) became frightened and unmanageable, and threw appellant to the ground, all without fault upon his part, and he was thereby very seriously injured, sustaining a very serious fracture of the leg, and otherwise bruised. The court below sustained a general demurrer to the complaint on this state of facts, and appellant asks that the ruling be reversed.

Section 7 of article 18 of the charter of the city of Phoenix provides, as follows: "Sec. 7. That said corporation shall not be liable to any one, or for any loss or injury to person or property growing out of or caused by the malfeasance, misfeasance, or neglect of duty of any officer or other authorities of said city or for any injury or damages happening to such person or property on account of the condition of any zanja, sewer, cesspool, street, sidewalk or public ground therein, but this does not exonerate any officer of said city or any other person from such liability when such casualty or

accident is caused by willful neglect of duty enforced upon such officer or person by law or by the gross negligence or willful misconduct of any such officer or person in any other respect." It seems to us that any fair construction of this section inhibits such form of action against the city. Appellant, in his reply brief, disclaims any negligence on the part of the city marshal in granting the permit, but says it became the negligent act of the city itself, and such city was an agency in the committing of the injury. We are unable to agree to this line of argument. It could not do more than to undertake the evasion of the plain letter of the city charter. Under this charter, if the city officer performs an act which is authorized by an ordinance, it would not, on his part, be negligence. Then, how could it become negligence on the part of the city itself? Plymouth, Ind., had an ordinance prohibiting the firing of gunpowder, or any other substance, except on occasions of public rejoicing, when the mayor granted permission to fire guns, cannons, and other things in which gunpowder was used. On the 4th of July, 1885, the mayor granted permission to fire gunpowder in an anvil on a lot in said city; and when it was fired it blew gravel and stones against one Wheeler's plate-glass windows, and broke them. The supreme court of Indiana, in *Wheeler v. City of Plymouth*, 18 N. E. 532, in passing upon the question of the liability of the city, says: "A city which has an ordinance prohibiting the firing of gunpowder, but allowing the mayor to license such firing on certain occasions, is not liable for the damage occasioned by the negligence of the licensees, there being nothing to show that the authorized act was necessarily dangerous." It is also decided in the same case that "there is no actionable breach of corporate duty in failing to enact a proper ordinance, or in failing to enforce one that has been enacted; and consequently this action cannot be maintained upon the theory that there was a proper ordinance, nor upon the theory that the ordinance was not enforced." Under this theory, it seems clear that the action at bar could not be maintained if the ordinance was not enforced. Then, upon what system of reasoning could it be maintained because it was suspended for a day? For failing in governmental action, municipal corporations are responsible only to their corporators, or the power creating them. *Cooley, Torts*, 620. It shows no ground of action when one complains that he has suffered damages because the operation of an ordinance which prevents the explosion of fireworks within the city has been temporarily suspended. *Id.* *Lincoln v. City of Boston* (Mass.) 20 N. E. 329, was also a case where the mayor permitted the firing of cannon upon the commons under an ordinance forbidding it unless such permission was given, and the plaintiff's horse took fright and ran away on a neighboring street. This

license to fire cannon was held to be an act of municipal government, and the person doing the firing was not the city's agent, so as to make the city liable. The firing of the Chinese bombs, in the case at bar, was not the act of the city, nor did the city have any agency in said act. A licensee does not thereby become the agent of a municipal corporation. *Id.*; *Fowle v. Alexandria*, 3 Pet. 398. Chief Justice Marshall, in *Fowle v. Alexandria*, says: "That corporations are bound by their contracts is admitted. That money corporations, or those carrying on business for themselves, are liable for torts, is well settled. But that a legislative corporation, established as a part of the government of the country, is liable for losses sustained by a nonfeasance—by an omission of the corporate body to observe a law of its own, in which no penalty is provided—is a principle for which we can find no precedent." *Rivers v. Common Council*, 65 Ga. 376, is a well-considered case, and is very similar to the case at bar. The plaintiff, a minor child, while walking upon one of defendant's streets, was seriously gored by a cow which was running at large in the streets of said city. She sued the corporation for damages alleged to be sustained by reason of this misfortune. It will be noticed, by reference to the facts in this case, that the allegations of the declaration are quite similar to the complaint in the case before us. In 1878 the city had an ordinance against cattle running at large. This ordinance was suspended at the time of the injury to the child. Mr. Justice Crawford says: "The adoption of an ordinance in reference to allowing cattle to run at large in the city is one which is wholly legislative, and therefore discretionary. It is not liable in damages for neglecting, omitting, or refusing to notice the subject, or having noticed it, and adopted an ordinance concerning it, then to repeal or suspend it." The same reasoning would undoubtedly apply to an ordinance against the firing of bombs, etc. In the Georgia case, it was argued that, so long as a city fails to legislate, it is not liable, but, when it does, then its liability for damages accrues. The court was unable to appreciate this difference, but cited the case of *Hill v. Board*, 72 N. C. 55, as a case directly in point. An ordinance prohibiting the use of fireworks was passed, remained in force some years, was then suspended from the 25th day of December to January 1st, inclusive. During this time, by the firing off of squibs, firecrackers, and Roman candles, plaintiff's house was burned, for which he sued the city. Held, that it was within the discretion of the authorities to determine, from time to time, what ordinances were proper, and that the corporation was not liable. Also, see, *Tindley v. City of Salem*, 50 Am. Rep. 289; *Hill v. Board*, 21 Am. Rep. 451. If the ordinance in question had been repealed on the day before the accident to appellant, it seems clear that there

could be no liability against the city. Then, upon what system of reasoning could he recover simply because the ordinance was suspended on the day of the accident?

Appellant, in his brief, relies upon the cases of *Cohen v. Mayor*, etc., 113 N. Y. 532, 21 N. E. 700; *Spier v. City of Brooklyn* (N. Y. App.) 34 N. E. 727. In *Cohen v. Mayor*, etc., the facts were that the city, by a permit, allowed a grocer to keep a wagon in front of his store, when not in use. On a certain morning, Cohen was walking along the street, in front of the grocer's store. At the same time a wagon loaded with ice was passing in one direction, and one loaded with coal was passing in the other. The grocer's wagon, without any horse attached, was standing in front of his store. The thills were tied up in a perpendicular position with a string. The length of the wagon was parallel with the course of the street. The ice wagon, probably in attempting to avoid the coal wagon, caught against the wheel of the grocer's wagon, turned it around, and loosened the thills, so that they fell, and struck Cohen on the head, injuring him so that he died the next day. The city was held liable. The court held that the permission was not authorized by law, and that the owner of the wagon acquired no right by virtue of the license to store his wagon in the street, and in doing so he was clearly guilty of maintaining a nuisance. The defendant was also guilty because it assumed to authorize the erection and continuance of a nuisance. The legal power to obstruct the street by grant of a license had been withheld by the legislature from the city. Nevertheless, it did grant such a permit, and took a compensation on account of it. In thus doing, the city became a partner in the erection and continuance of such nuisance. *Spier v. City of Brooklyn*, supra, was a case where fireworks were allowed by the mayor, under an ordinance, at the junction of two narrow streets in the city of Brooklyn, and plaintiff's property was destroyed, and the city was held liable; the court having held that the circumstances of that particular case made the same a public nuisance, and the plaintiff recovered under that theory. Such displays, the court seemed to think, should be under the supervision of the municipal authorities, and it was probably entirely proper for the court to rule as it did in this particular case. It was at the junction of two narrow streets of a large city, completely built upon, and where any misadventure in managing the discharge would be likely to result in injuries to persons or property. The action in the case at bar is not upon the theory that the city was guilty of unlawfully erecting and maintaining a nuisance. A city is liable for maintaining a nuisance, unless expressly authorized by law to do so. It was on this theory a recovery was had in the New York cases. It may have been an error of judgment in

the officers of the city in granting the permit or suspending the ordinance on the particular street on the day alleged, but cities are not responsible for errors of judgment of their officers in the enforcing of their laws. We must conclude that, both from

the reading of the charter of the city, and the weight of authority, the chief justice was correct in sustaining the demurrer, and the judgment is affirmed.

ROUSE and SLOAN, JJ., concur.

JACKSON v. CITY OF GREENVILLE.

(16 South. 382, 72 Miss. 220.)

Supreme Court of Mississippi. Oct. 22, 1894.

Appeal from circuit court, Washington county; R. W. Williamson, Judge.

Action by D. D. Jackson against the city of Greenville. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Jayne & Watson and S. Akin, for appellant. J. H. Wynn, for appellee.

WOODS, J. This action was brought by the appellant for the recovery of damages for injuries sustained by him in consequence of defects in a sidewalk in the city of Greenville, negligently suffered to exist. To the declaration filed, appellee interposed the plea of the general issue, and gave notice thereunder (1) that the injury complained of was the result of plaintiff's own negligence; and (2) that at the time of the injury, and for a reasonable time before, the defendant city had exercised and exhausted all its powers, under the law, to raise money for the repair of its streets, and that all its funds were, at the time mentioned, exhausted. After all the evidence on both sides had been introduced, at the request of the appellee, the court instructed the jury peremptorily to find for the defendant city; and from the judgment of the court, following such instruction, this appeal is prosecuted. We shall disincumber our consideration of the appeal by omitting any reference to the notice of exhaustion of power and funds on the part of the municipality, as no evidence to support it was offered, and by omitting any discussion of the question of the contributory negligence of the appellant, and confine ourselves to this single question, viz.: Was the appellant, at the time of receiving the injury, making such use of the street and sidewalk as will entitle him to a recovery for hurt suffered by reason of defects in the sidewalk?

It is elementary law that streets are primarily designed to be used for purposes of transportation and travel; and the authorities are uniform to the effect that, in the absence of any express statute creating liability, municipal corporations, clothed with plenary and exclusive control over their streets, are yet liable, by implication, for injuries resulting to persons properly using such streets, for failure to maintain the same in a reasonably safe condition for travel. That the rule as stated is substantially recognized and applied by the courts in cases of statutory and of implied liability will appear by examination of the adjudications of courts of last resort in both classes, and any seeming want of harmony will, in most instances, appear to have arisen from failure to confine the language of the several courts to the facts of the particular case. What are the facts as shown in the evidence introduced on trial below by the appellant, which are supposed by counsel for appellee to bar any recovery herein? We quote from the

testimony of the appellant: "The accident occurred in this way: I had a puppy there, and I took the puppy out on the sidewalk, and was playing with him; and he jerked loose from me, and I made a step to catch it, and my foot slipped into one of those cracks, and jerked me down, and, before I could recover, the plank flew up, and struck me on my leg. My foot was fastened in the crack. It was my right foot in the crack. I had my left foot on the ground, and I jerked my right foot up, and the plank flew up, and struck me on the left leg. It produced a compound fracture of my leg." On cross-examination the appellant said: "I was playing with a dog when the accident happened. I went out to the sidewalk. I had a pointer puppy there, and was playing with it. It tried to get away from me, and my foot slipped off the plank, and went into the crack; and in reaching over, I tried to pull my foot out, and the plank flew up, and struck me on the leg. My leg was broken. * * * The plank ran on the sidewalk crosswise. My foot was caught crosswise. Was standing rather crosswise. Was walking along when the accident occurred. Was playing with the dog. Was going nowhere. * * * My face was turned towards the fence; turned south. The dog was running between me and the paling, and I stooped to catch him, and my foot slipped." The case thus presented is that of a man of full age using the sidewalk, not for the purpose of travel, either for business or exercise or pleasure, but for the sole purpose of playing with a dog. The appellant had come out of his boarding house to the sidewalk. He was standing, and was not going anywhere. He was playing with the dog, and was standing with his back to the roadway, and his face turned towards the palings, when, in an effort to catch the dog, running between him and the fence, he stepped, and received his injury. Can it be satisfactorily gathered from the above statement that the appellant, when hurt, was making such reasonable use of the street or its sidewalk, at the time of receiving the injury complained of, as will bring him within the category of those for whom streets and sidewalks are designed? Was he a traveler on or along the street, who, incidentally halting or turning aside upon his way, received his hurt? Was the municipality under any duty to the appellant to keep in repair the sidewalk so that he might safely use it for the purpose of his play with the dog? Streets, we repeat, are designed for travel, primarily; and though it must be conceded that one using the street for travel may incidentally cease to move on continuously, and yet not lose his right as a traveler on the highway, yet it cannot be deduced from this concession that one not using the street for travel may, nevertheless, convert it, or part of it, into a playground, and in so using it, if injury occur while so using or misusing the street, by reason of de-

fects in it, hold the negligent municipality liable. To recover, the injured party must fix liability upon the municipality; and, to fix liability, the sufferer must show failure on its part to discharge a duty to him. But the duty to repair and keep in reasonably safe condition streets and sidewalks is due only to those using the highways for the purposes of their creation. If a football team appropriate a street to its uses in playing a game, and one of the players fall into a hole in the roadway, and injury result, would any one be found to say that he could rightfully complain and recover? In such case the injured player clearly would be frustrating the very end for which highways are ordained, viz. the convenient and safe transportation and travel of property and persons. It seems to us indisputable that one contravening the law of the creation, and the ends for which it was created, cannot be heard to complain if ill befall him because of his own wrongdoing.

Many cases have been examined by us where liability was imposed and recovery had for injuries to children, not of the age of discretion, when playing on the streets or highways; but all such cases, on well-understood legal principles, are readily distinguishable from the case at bar. *Chicago v. Keefe*, 114 Ill. 222, 2 N. E. 267, and *Indianapolis v. Emmelen*, 108 Ind. 530, 9 N. E. 155, cited in the brief of appellant's counsel, are of this character. Our own adjudications are along the same line, in like cases. *Mackey v. City of Vicksburg*, 64 Miss. 777, 2 South. 178; *Vicksburg v. McLain*, 67 Miss. 4, 6 South. 774. When we come to consider the cases referred to by the counsel wherein adults received injuries in streets, we shall discover that none of them, on their facts, at all resemble the case at bar. The sinewy, lucid, and caustically humorous opinion in *Varney v. Manchester*, 58 N. H. 430, was upon these facts, in a word, viz.: Varney, the plaintiff, went to a certain street in Manchester for the purpose of seeing a procession form on Decoration Day. He went down one side of the street to the place where the procession was forming, and crossed over the street to get a better view. He stood looking at the forming of the procession, near a pile of lumber; and, after so standing and looking from three to five minutes, the lumber fell, and crushed his foot. Held, that a person is "traveling upon a highway" when he is making a reasonable use of a highway as a way, and that the law does not prescribe how long one may stand on a street without ceasing to use the way as a way; but that the question was one of reasonable use, and this was for a jury's determination, if there is any evidence on which they could properly find the use was reasonable. The case of *Murray v. McShane*, 52 Md. 217, is that of an adult lawfully passing along a street, and stopping for an instant on a doorsill of a house fronting the

street, for the purpose of adjusting his shoe, and suffering injury in consequence of a brick falling from a dilapidated wall, negligently permitted to remain there. Held, that travelers on a street have not only the right to pass, but to stop on necessary and reasonable occasions, so they do not obstruct the street or doorway. In *Duffy v. City of Dubuque*, 63 Iowa, 171, 18 N. W. 900, the facts were that Duffy, who was a workman, went to the corner of the two intersecting streets for the purpose of doing some work on a house there situated. After he had unloaded some stuff from a wagon, he went along the sidewalk to a hydrant eight feet in rear of the house and a foot or two from the line of the sidewalk. While in the act of drawing water from the hydrant, with one foot on the ground, and the other on the sidewalk, a section of a roof, negligently left standing near, was blown over by a gust of wind, fell on Duffy, and inflicted the injuries of which he complained. Held, that Duffy's stopping to draw water as stated was the exercise of a privilege which he might lawfully enjoy, and was a mere incident to the general use of the street which he was making. The opinions of the New England courts, when liability in the character of cases which we are considering is of statutory creation, and in which, as is sometimes charged, extreme and antiquated views are announced, it will be found, on careful analysis, are not out of general accordance with the spirit of the most, not to say all, of the decisions elsewhere which we have examined. In the case of *Blodgett v. City of Boston*, 8 Allen, 237, while the court deny the liability of the city for injuries received by a boy 11 years old, who was using the plank sidewalk on the street with another boy for purpose of play only, yet the opinion is careful to limit the effect of the decision by saying: "We do not certainly think any narrow or restricted signification should be given to the word 'traveler,' as used in the statute. It may well embrace within its meaning, as applied to the subject-matter, every one, whatever may be his age or condition, who has occasion to pass over the highway for any purpose of business, convenience, or pleasure. * * * We by no means intend to say that a child who receives an injury caused by a defect or want of repair in a road or street, while passing over or through it, would be barred of all remedy against a town merely because, at the time of the occurrence of the accident, he was also engaged in some childish sport or amusement. There would exist in such case the important element that the person injured was actually traveling over the way. But this element is wholly wanting in the case at bar." Here, as in the case just quoted from, the important element of actual use of the way for the purpose of travel is wholly absent. Here, as there, the case shows an appropriation of a sidewalk to a use other than, and incon-

sistent with, that for which the highway was established. Here, however, the offender against the rights of the public was an adult, and not a child of debatable discretion. Here, in addition, the play with the dog was not a mere incident to the general and proper use of the sidewalk by the appellant in passing along or over it. The city owed him no duty, in his situation, and using the street as he was doing. The duty was

on the municipality to keep and maintain the street in reasonably safe repair for travel, and liability ensued upon injury befalling one going along or over it, whether for purposes of business or pleasure, by reason of failure to keep and perform this duty. But to one simply using the street or sidewalk as a playground the city owed no duty to keep its streets for him so engaged in any repair. Affirmed.

HAMILTON v. CITY OF DETROIT.

(63 N. W. 511, 105 Mich. 514.)

Supreme Court of Michigan. May 28, 1895.

Error to circuit court, Wayne county; Willard M. Lillibridge, Judge.

Action by Ralph Hamilton, Jr., by next friend, against the city of Detroit, for personal injuries. From a judgment for defendant, plaintiff brings error. Affirmed.

Charles C. Stewart (S. O. Van De Mark, of counsel), for appellant. John J. Speed, for appellee.

McGRATH, C. J. Defendant had let to one Porath the contract for the construction of a public sewer in Wabash avenue. Porath, for the purpose of enabling him to tunnel, had put down a shaft about 6 feet square, and over it had erected a derrick. On the north side of the derrick a platform had been erected, some 5 or 6 feet from the street level, extending north 30 feet. The clay was elevated in buckets to a point above the platform, and then dumped into a light car. The car was then run along the platform, and the earth dumped over the side of the platform. Plaintiff, who was about five years old, after work had ceased for the day, had climbed up to the top of the platform, and, while playing with the car, fell from the south end of the platform down into the shaft, and was injured. That part of the street was closed against travel and guarded against accident to persons in the ordinary use of the street. The injury cannot, therefore, be said to have resulted from a defective condition of the street, or from a failure to guard the excavation against injury to persons using the highway. In this respect the case differs from *City of Detroit v. Corey*, 9 Mich. 164. In *Storrs v. City of Utica*, 17 N. Y. 104, cited in support of that opinion, the liability of the city is put on the ground of its duty to keep the streets in re-

pair. In *Bailey v. City of New York*, 3 Hill, 531, the dam which gave way was owned by the city. In *Leshner v. Navigation Co.*, 14 Ill. 85, the company was authorized by its charter to enter upon plaintiff's land, and take therefrom material for the construction of its works, by making compensation therefor, and the court held that the privilege which the charter conferred upon the company devolved upon the contractors for the same purpose. In other words, that the company could not, by an agreement with the contractors that the latter should furnish the material, authorize such contractors to enter upon plaintiff's land, and take the material, and deprive the owner of the material of the right to claim compensation therefor from it. The contractors' justification, in an action against them for trespass, would have been the authority conferred upon the company, and, so far as plaintiff was concerned, the taking was by the company under the authority so conferred. In no sense was the agency a general one, so as to make the company liable for the debts or torts of the contractors. In the *Corey Case* the court held that the city took its power with the understanding that it should be so executed as not necessarily to interfere with the rights of the public in the streets, and that all needful and proper measures would be taken, in the execution of the power, to guard against accident to persons lawfully using the highways. The liability of the city is coextensive with its duty respecting the ordinary use of the highway, but cannot be extended beyond that limit to a case like the present, where a child had been attracted by the machinery employed in the construction or operation of the work, and thereby induced to climb upon or over the barriers or guards, into the excavation. This conclusion renders it unnecessary to consider the other questions raised. The judgment is affirmed. The other justices concurred.

CITY OF CHADRON v. GLOVER.

(62 N. W. 62, 43 Neb. 732.)

Supreme Court of Nebraska. Feb. 5, 1895.

Error to district court, Dawes county; Kin-
kaid, Judge.Action by Eliza J. Glover against the city
of Chadron. Judgment for plaintiff, and de-
fendant brings error. Affirmed.Spargur & Fisher, for plaintiff in error. C.
Dana Sayrs and A. W. Crites, for defendant
in error.IRVINE, C.¹ * * * * *

It is also contended that the injury occurred at a point outside of the line of the sidewalk, as established by ordinance. It would seem from the evidence that at this point a sidewalk about 12 feet wide existed, extending from the outer line of the sidewalk, elsewhere along the street, back to a rink used for public entertainments, while the ordinance provided for a sidewalk only four feet in width. It is uncertain whether the defect complained of was within the four feet or beyond it;

¹ Part of the opinion is omitted.

but, assuming that it was beyond the limit established by ordinance, still the evidence shows that the situation was much the same as in Foxworthy v. City of Hastings, 25 Neb. 133, 41 N. W. 132. At least, it is clear that the whole formed a continuous walk, open to the public, and that the city had exercised control over the whole thereof. The city having permitted the sidewalk, its duty to maintain the same is not affected by the fact that under its ordinance a narrower walk might have been erected. Foxworthy v. City of Hastings, 25 Neb. 133, 41 N. W. 132; Kinney v. City of Tekamah, 30 Neb. 605, 46 N. W. 835.

It is still further urged that the action is at least prematurely brought, because the plaintiff had filed a claim with the city which had not been acted upon when the suit was brought. Under the statute relating to cities of the class of Chadron, the total failure to present a claim of this character does not bar an action. Comp. St. c. 14, § 80; Nance v. Falls City, 16 Neb. 85, 20 N. W. 109. In all other respects we think there is ample evidence to sustain the verdict, but a review of the evidence would be useless. Judgment affirmed.

BLYHL v. VILLAGE OF WATERVILLE.

(58 N. W. 817, 57 Minn. 115.)

Supreme Court of Minnesota. April 20, 1894.

Appeal from district court, Le Sueur county; Francis Cadwell, Judge.

Action by Alexander Blyhl against the village of Waterville to recover for personal injuries. Judgment for the plaintiff. Defendant appeals. Affirmed.

M. R. Everett and H. S. Gipson, for appellant. F. B. Andrews and John Noonan, for respondent.

GILFILLAN, C. J. The defendant, a municipal corporation, required an owner of a lot abutting on one of its streets to construct a plank walk along the street by the side of his lot, and he constructed it on a grade given him by, and under the direction and with the approval of, defendant's street commissioner. As constructed, the walk made, at the junction of this new walk with the walk along the remainder of the block, a drop or step seven or eight inches in height. It is apparent there was no necessity or reason for having the drop instead of gradually sloping the grade of the new walk until it came to the grade of the remainder. It is also apparent that so sloping it would have made a safe walk, and that the drop made it dangerous to one passing along it in the dark. After the walk had been in that condition for about a month, plaintiff, passing along it in the dark, hit his foot against the face of the drop, and fell, and was injured, and brings this action to recover for the injury. From a judgment after verdict in his favor the defendant appeals.

Unless the defendant is exempt from liability on the ground claimed by it as hereinafter stated, the existence of the drop in the sidewalk to the knowledge of defendant, through its street commissioner, was sufficient to make defendant's negligence a question for the jury. *Tabor v. City of St. Paul*, 38 Minn. 188, 30 N. W. 765. The defendant claims it cannot be held, because the defect in the walk was in the plan on which it was constructed; that the adoption by a municipal corporation of a plan for a public improvement is a legislative or discretionary function, and that the corporation is not liable for the consequences of any error in the discharge of such functions. That a municipal corporation is not liable for consequential injuries arising from the bona fide exercise of, or omission to exercise, those powers which are conferred on its council or legislative body, and the exercise of which as to the time, extent, and manner is left to the discretion or judgment of such body, has been fully recognized by this court. *Lee v. City of Minneapolis*, 22 Minn. 13; *Alden v. Same*, 24 Minn. 254. Most municipal public improvements come within such powers. Thus, unless controlled by charter provisions,

when street grades shall be established, and on what planes or levels; when grades shall be changed, and to what planes; when streets shall be paved, and with what kind of pavement; when sidewalks and crosswalks shall be laid, and of what material. what sewers, gutters, and catch basins shall be made, and when and how,—are usually left to the judgment or discretion of the legislative body of the corporation. And while, of course, it is expected the best results to the people of the corporation will follow the efforts of that body, it is not enjoined as a duty to produce any particular result, so that failure to bring it about will make the corporation liable for consequential injuries. The matter of keeping streets and sidewalks in safe condition stands on a different footing. It has always been held in this state that a municipal corporation having exclusive control of its streets, when the means are within its power, has imposed on it a positive duty to keep such streets in reasonably safe condition. Scores of recoveries for injuries resulting from neglect of that duty have been sustained in this court. The first formal statement of the rule was in *Shurtle v. City of Minneapolis*, 17 Minn. 308 (Gil. 284) in these words: "It is well settled that a municipal corporation having the exclusive control of the streets and bridges within its limits, at least if the means for performing the duty are provided or placed at its disposal, is obliged to keep them in a safe condition; and if it unreasonably neglects this duty, and injury results to any person by this neglect, the corporation is liable for the damages sustained." In this particular there is not only a power conferred, but there is also a duty imposed, to use the power with a view to a particular result, to wit, the safe condition of the streets. Of this duty *Dill. Mun. Corp. (4th Ed.) § 1023a*, says: "Which duty is not legislative or judicial, but rather, in its nature, ministerial." It is therefore not left to the corporation's legislative body to determine when or to what extent the duty shall be performed, nor to determine it has been performed; for, if it were, it would be a discretionary, not a positive, duty. That the safe condition of streets concerns the safety of life and limb, and not only convenience or property, is a reason for imposing a duty in respect to it greater than is imposed with respect to other matters of public improvement. No question is made, nor can there be, on the decisions that, if a dangerous defect is due to wear, decay, accident, or the act of a third person, the corporation, upon notice of it, must seasonably repair it. In this case, if the property owner had, without authority, constructed the sidewalk with the dangerous defect, it would have been the duty of the corporation to seasonably remedy it. The corporation might adopt or ratify the plan on which the owner constructed the walk; but to hold that by so adopting or ratifying it it could avoid the

duty to remedy the defect would enable it to determine whether it would perform the duty imposed on it or not, and it would cease to be a duty. And if the corporation is not liable in case of a dangerous defect in a street or sidewalk, because the defect is in the plan previously adopted for its construction, then, although it is its duty to keep the streets in safe condition as against natural causes or the acts of third persons, it is not its duty to keep them in such condition as against its own acts. And whether it is its duty or not will depend on whether it is responsible for the unsafe condition; and if it may, without liability, determine in advance, in adopting a plan for construction, that a certain condition of the street or walk will be safe enough, we do not see upon what principle it is to be liable if, after the condition exists, from whatever cause, it determines the street or walk to be safe enough, and to need no repair.

We have not used the term "positive duty" in the sense that the corporation insures the safe condition of its streets, or that it is bound to maintain them in that condition without reference to the difficulties in the way of doing so. There may be defects that are practically irremediable. The topography of the ground may be such as to render it practically impossible to have the streets entirely safe. In that case the people must accept such as with reasonable efforts can be provided. The law does not require of the corporation unreasonable things, but only that it shall employ, in performing its duty as to streets, the diligence, care, and skill that an ordinarily prudent person having a similar duty to perform would employ. If it do so, there is no unreasonable neglect. So far as concerns the safe condition of a street or sidewalk, the same requirement applies to adopting a plan either for its construction or repair. Of course the corporation would not be liable merely because, in the opinion of a jury, a safer or better plan might have been adopted. To illustrate, we may suppose a not uncommon case, where, owing to the character of the surface, a sidewalk must be constructed on one of two plans, each leaving it more or less unsafe,—one requiring a slope so steep as to be unsafe; the other, steps

that will make it unsafe. The corporation would not be liable for the dangers in the plan adopted merely because, in the opinion of a jury, the other would have been safer. To make the corporation liable, the plan adopted would have to be so much and so obviously more unsafe than the other as to show a neglect to employ the diligence, judgment, and skill in determining the plan which ordinary care would require.

We are cited to some decisions in Michigan, New York, and Pennsylvania to the effect that a corporation is not liable for the consequences of a dangerous defect in a street or walk due to the plan adopted for its construction, because it is only an error of judgment in a matter resting wholly in the judgment or discretion of the corporation. Those decisions are irreconcilable in principle with other decisions of the same courts, and inconsistent with the proposition that keeping streets in reasonably safe condition is a matter of positive duty, and not of discretion. We are therefore of opinion that the mere fact that an unsafe condition of a street is due to a defect in the plan for its construction will not shield the corporation from liability for injuries caused by such unsafe condition. There is no merit in any of the other points made by appellant. Judgment affirmed.

CANTY, J. I agree with the result in this case and with the foregoing opinion, except that it seems to me it does not sufficiently limit the right of the courts to impeach or review the legislative judgment in adopting the plan of improvement. When the alleged defect appears to be a part of the plan, it should be presumed to be of legislative, not of ministerial, origin, until the contrary is proved. The courts cannot review the legislative judgment at all. They can impeach it only when it is not legislative judgment in fact. Unless it appears that the alleged defect is of ministerial origin, it must appear that there is such gross mistake in the adoption of the plan as would imply a failure to exercise the legislative judgment. If two reasonable minds might have adopted different plans, the legislative judgment cannot be impeached for having adopted either one of these plans.

CITY OF ATLANTA v. MILAM.

(22 S. E. 43, 95 Ga. 135.)

Supreme Court of Georgia. Dec. 4, 1894.

Error from city court of Atlanta; Howard Van Epps, Judge.

Action by John A. Milam against the city of Atlanta for personal injuries. Plaintiff had judgment, and defendant brings error. Plaintiff also filed a cross bill of exceptions. Affirmed, and cross bill of exceptions dismissed.

The following is the official report:

Milam sued the city of Atlanta for damages from a personal injury which he alleged he received on or about April 1, 1892, from falling violently over a high, iron projection near the corner of Alabama and Broad streets, Atlanta, negligently allowed by defendant to project far out into the public sidewalk, and obstruct the same for about four feet. The verdict was for plaintiff, \$833. Defendant's motion for new trial was overruled, and it excepted. The motion contained the general grounds that the verdict was contrary to law, evidence, etc., and also that it was contrary to certain specified portions of the charge. Further, because the court erred in the following charge: "This duty of diligence extends to the whole of the sidewalk which is intended for travel by the public as a thoroughfare for travel, and is not confined to any special part of the sidewalk in use by the general public in walking along there. It is bound to keep all of its width reasonably safe for persons to travel along its entire width." Alleged to be error because it did not fairly submit to the jury defendant's contention that the strip of iron was not an actionable defect in the street, but was only a proper part of an ordinary, necessary, and reasonable appurtenance of the Inman Building, which abutted on the street at that point. During the trial, before the close of plaintiff's evidence, defendant moved the court to send the jury, in charge of the court's bailiff, to inspect and view for themselves the alleged defective sidewalk, grating, and iron over which it was alleged plaintiff fell. Plaintiff objected on the ground that the court had no authority to send out the jury in this manner, and to take evidence, in this manner, that could not be reviewed by the court, and on the ground that it was improper in this case, as plaintiff denied that the defective premises were in

the same condition as when plaintiff fell. These objections the court overruled, and ordered the jury to be sent, in charge of the bailiff, to view the alleged defective premises and sidewalk, which was accordingly done. To this action of the court plaintiff assigns error, by cross bill of exceptions.

J. A. Anderson and Fulton Colville, for plaintiff in error. Arnold & Arnold and C. D. Hill, for defendant in error.

LUMPKIN, J. The facts are stated by the reporter. The law of this case is not very complicated. While, of course, in most American cities, water plugs, telegraph and telephone poles, trees, and other things, are allowed upon the margins of sidewalks, and pedestrians, therefore, are not expected to use such portions of the same as are occupied by these obstructions, still there can be no doubt, under the rules of law now settled by repeated adjudications in this and other jurisdictions, that the city authorities must keep in a reasonably safe condition all parts of its sidewalks which are intended to be used by the public. It may often happen that in a particular locality a comparatively narrow portion of a sidewalk, on either side or in the middle of it, is much more generally used than other portions of the same; but this does not relieve the municipal authorities from liability for negligence in permitting dangerous obstructions to be continuously maintained in places upon sidewalks over which the public have a right to pass, merely because those places are not so much used as others. It appeared in this case that the obstruction over which the plaintiff fell had existed for a considerable time, and was located upon a portion of the sidewalk over which he had a right to walk. The evidence as to the dangerous character of the sidewalk was rather weak,—so much so that we would very probably have set aside the verdict in the plaintiff's favor, had it not been for the fact that the jury, at the request of the defendant, were permitted to personally inspect the obstruction, and form their own opinion concerning it, by ocular demonstration. We are constrained to hold that they were better judges on the subject, after this opportunity of obtaining information, than we could possibly be from a mere paper report of the testimony introduced in the case. We will therefore allow the verdict to stand. Judgment affirmed.

TOWN OF FOWLER v. LINQUIST.

(37 N. E. 133, 138 Ind. 566.)

Supreme Court of Indiana. April 17, 1894.

Appeal from circuit court, Newton county; E. P. Hammond, Judge.

Action by Charles Linquist against the town of Fowler for personal injuries. From a judgment for plaintiff, defendant appeals. Affirmed.

W. D. Wallace and S. P. Baird, for appellant. J. D. Brown and G. H. Gray, for appellee.

HOWARD, C. J. This was an action by the appellee against the appellant to recover damages for personal injuries alleged to have been caused by an obstruction in one of the streets of said town. On the overruling of demurrers to the complaint the appellant answered in general denial, and also by two special pleas, to the first of which a demurrer was overruled, while to the second a demurrer was sustained. The issues joined were tried by a jury, and by agreement the jury returned into court their special verdict on all the issues in the cause. The material facts found are: That Park street, in the town of Fowler, in Benton county, is a public street, which was laid out and dedicated many years ago, and accepted by said town, and which for many years past has been used and traveled, and was on the 27th day of October, 1891, used and traveled, by the citizens of said town and by the public. That in April or May, 1891, one Jacob Lucas erected a fence across said street, from the southeast corner of outlot 29 to the southwest corner of outlot 28 of Fowler's addition to said town, and within the corporate limits thereof. Said fence consisted of four or five oak posts firmly planted to the depth of about two feet in the ground, with wire strung thereon, and securely fastened. In the center of said street, in said fence, was a gate fastened between two of said posts. In the summer of 1891 said obstruction was entirely removed, except one post, which remained standing, and of which appellant at the time had notice. This post stood about four or five feet above the ground, and about three feet west of the traveled part of said street. That appellant had due notice and full knowledge of said obstruction from May, 1891, and at all times since then up to the 27th day of October, 1891, and thereafter, two of the trustees of the town having actual notice during all said time, but the town took no steps to remove the obstruction. The town marshal also had full knowledge of the obstruction during all said time. That on said 27th day of October, 1891, the appellee, who is a farmer and laborer living in the southeast part of said town, was traveling southward towards his home on said Park street, driving a span of mules hitched to a two-horse wagon, with a hay ladder thereon, at a slow rate of speed, in

a careful and cautious manner, without any knowledge of the existence of said post, having been informed some four or five weeks prior thereto that said post had been taken down, and believing that it had been removed; and while so traveling upon said street his mules became frightened at some stray horses that were grazing in said street, without his fault or negligence, at or near said post, which stray horses caused said mules to shy to one side, whereby the hay frame that was on said wagon collided with and caught upon said post, which produced a sudden jerk and shock of said hay ladder, throwing the appellee off the wagon and between the mules, without fault of his. That the appellee's leg was caught between the spokes of one wheel of the wagon, and was thereby twisted, wrenched, and broken without his fault. That said accident occurred at or near 7 o'clock in the evening of said day, and when it was dark. That when said mules became frightened, and before the hay ladder collided with the post, the appellee pulled on the lines, and used every effort in his power to check the mules, but was unable to control them. That for several rods before the mules became frightened the appellee was driving slowly, and that the mules were not accustomed to run away or to become frightened. That appellee was standing up on said hay ladder, driving the mules with lines, and looking forward to see any obstruction that might be on said street. That the street is about 60 feet wide at the place of said obstruction, and the surface of the ground is comparatively level. That the post was unguarded, and without light or signals to warn travelers of its location. That said mules, while so frightened and beyond the control of appellee, drew the wagon out of the traveled part of the street, and near to said post, causing the collision, after which the mules ran off with the wagon, leaving the appellee helpless upon the ground, with both bones of the left leg broken between the knee and ankle, where he remained until assistance arrived, and he was carried home. That he was at once attended by a competent physician and surgeon, who properly and skillfully treated him, and that all proper attention was given him. That the knee joint is partially, and the ankle wholly, stiff, and the leg crooked, and two inches short, and the appellee maimed and crippled for life, and wholly incapable of performing manual labor or pursuing his usual avocations. That he has suffered and endured great pain and torture, both physically and mentally. That at the time of and prior to receiving said injuries the appellee was a strong, healthy man, and was industrious. That he is 51 years of age, and has a wife and eight minor children, who are wholly dependent upon him for support. That by reason of said injuries he has sustained damages in the sum of \$6,000. A motion for a venire de novo was over-

ruled. A motion for a new trial having been filed, the appellee filed a remittitur of \$1,000 of the damages allowed by the verdict of the jury, whereupon the motion for a new trial was overruled. The appellant then filed a motion for judgment in its favor upon the verdict, which was also overruled. Judgment for \$5,000 was then rendered in favor of appellee. After the evidence was given, and before the argument of counsel, the appellant moved the court to instruct the jury to return a verdict for the appellant, on the ground that appellant was not liable for the injuries suffered by appellee. This motion was overruled, which ruling is made one of the grounds of the motion for a new trial. The motion for a verdict in favor of the appellant is brought into the record by special bill of exceptions.

(1) Many assignments of error are made, but the chief reason argued why the judgment should be reversed is that it was not shown that the place where the injury was received was a public street. It is not questioned that in 1875—more than 16 years before the time of the injuries complained of—Fowler's addition to the town of Fowler, including Park street, and the place therein where the injuries were received, was duly platted, and the plat acknowledged and recorded. But appellant first objects that no proof other than the plat was introduced to show that at the time of making, filing, and recording such plat Moses Fowler was the owner of the land so platted. This is not a controversy as to the ownership of the ground occupied by the street. No one claiming to be the owner of the land occupied by the street is here as a party denying the dedication. In such case strict proof of ownership is not required, as in ejectionment. There was in the court below no denial of ownership in the dedicator at the time of the dedication, and the evidence shows continued use of the street by the public ever since, except during the short time that the fence was placed across it. As between the parties to this action, the plat of Fowler's addition on which "Park Street" appears, and which was filed and recorded in the recorder's office for more than 16 years prior to October 27, 1891, is prima facie evidence of ownership by Fowler of the land so dedicated, and of his intention to so dedicate it. 2 Greenl. Ev. § 662; Railroad Co. v. Andrews, 41 Kan. 370, 21 Pac. 276; State v. Hill, 10 Ind. 219. See, also, City of Indianapolis v. Kingsbury, 101 Ind. 202; Elliott, Roads & S. p. 121 et seq.

(2) It is next contended that there was no acceptance of the dedication, either by the town or by the public. The jury expressly found "that there is a public street in said town of Fowler named and known as 'Park Street,' which was laid out and dedicated to said town many years ago, and accepted by said town, beginning at the north limits of said town, running due south through said

town to the south line of said town, which street for many years past has been used and traveled, and was on the 27th day of October last traveled, by the citizens of said town and by the public." This finding, even omitting what may be regarded as conclusions, is, we think, sufficiently clear to show acceptance and use of the street by the town and by the public. We have looked through the evidence, and we think that the finding is well supported by the testimony of witnesses, from which it appears not only that the way was used by the public long before the dedication and ever since, but also that the town authorities worked the street where such work was needed. The jury finds that at the point of the accident the ground was comparatively level. No work was needed there. But there was evidence of some work by the town authorities to the north of the place of the accident, and also to the south, where the town marshal aided in the erection of a bridge upon the street. As to user by the public, there was evidence from which the jury might reasonably conclude that the road had been used by the public as a thoroughfare for 20 or 21 years. This is sufficient. Elliott, Roads & S. p. 125 et seq., and cases cited; Summers v. State, 51 Ind. 201.

It is next contended that the appellee (3) should not recover, for the reason that he knew of the obstruction, and should, therefore, have avoided it. The appellee, however, testified positively that he did not know that the post still remained in the street, as he had been informed some time before that it had been removed. Besides, it is agreed that his mules were frightened, and the evidence is undoubted that they shied off the beaten track in spite of all efforts made by appellee to control them. The post was several feet from the traveled track, and, even if appellee knew it was still there, he could not be held responsible for the frightening of his team, and their going out of the beaten track and upon the post, when he was utterly unable to control them. We do not think that any contributory negligence is shown. Maus v. City of Springfield, 101 Mo. 613, 14 S. W. 630.

Counsel point out many facts as to which they contend that there is no finding in the verdict of the jury, but as to which they say there should have been findings under the issues. Even if this were true, it would, of itself, be no ground for reversal of the judgment, provided facts sufficient for a recovery are found. A failure to find upon an issue in such a case is to be taken as a finding against the party upon whom rested the burden of proof upon that issue. But we think that, omitting all conclusions of law from the verdict, there are sufficient facts found upon which the judgment may stand. Neither can we say, considering all the circumstances of the case, that the damages are excessive.

Several objections are urged against the

(4) complaint, but we think they are all without substantial merit. It is claimed that the proximate cause of the accident was not the obstruction in the street, but the frightening of the team by the stray horses, and that for this reason the complaint is bad. If the town was at fault as to the obstruction, and the obstruction was one cause of the injury, the town cannot escape responsibility because some other cause aided in bringing about the accident. See Board of Com'rs v. Mutchler (decided at this term) 36 N. E. 534, where a horse driven in a buggy was frightened, and backed off a bridge, but where the board of commissioners was held responsible for the accident, for the reason

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that they had neglected to place guards upon the bridge. See, also, City of Crawfordsville v. Smith, 79 Ind. 308.

The court did not err in sustaining a demurrer to the third paragraph of the answer. In that paragraph it was averred, in effect, (5) that appellee might have taken another road, and so avoided the obstruction. The road taken by appellee was the most direct to his home, and, even if it were not so, he was not obliged to choose another road when this one was open to the public. See Board of Com'rs v. Mutchler, supra. We have found no error in the record for which we should be justified in reversing the judgment. The judgment is affirmed.

FLYNN v. TAYLOR.

(28 N. E. 418, 127 N. Y. 596.)

Court of Appeals of New York, Second Division.
Oct. 6, 1891.

Appeal by defendant from a judgment of the general term of the supreme court in the second judicial department, affirming a judgment entered upon the decision of the court without a jury. Affirmed.

Frederick C. Dexter, for appellant. Josiah T. Marean, for respondent.

VANN, J. The owner of land abutting upon a public street is permitted to encroach on the primary right of the public to a limited extent and for a temporary purpose, owing to the necessity of the case. Two facts, however, must exist to render the encroachment lawful: (1) The obstruction must be reasonably necessary for the transaction of business; (2) it must not unreasonably interfere with the rights of the public. Callanan v. Gilman, 107 N. Y. 360, 14 N. E. 264; Welsh v. Wilson, 101 N. Y. 254, 4 N. E. 633. The foundation upon which the exception seems to rest is that it is better for the public to suffer a slight inconvenience than for the adjacent owner to sustain a serious loss. Any unnecessary or unreasonable use of a street, however, is a public nuisance, and is declared by statute to be a crime against the order and economy of the state. Pen. Code, § 385. A remedy for the wrong against the public may be found in the indictment of the offender, or in a suit by the proper officer in behalf of the people to compel him to abate the nuisance. People v. Loehfelm, 102 N. Y. 1, 5 N. E. 783; People v. Horton, 64 N. Y. 610; People v. Cunningham, 1 Denio, 524; Attorney General v. Cohoes Co., 6 Paige, 133; Wood, Nuis. § 729; Will. Eq. Jur. (Potter's Ed.) 389, 401. Whenever any person sustains a special and peculiar loss in consequence of an unlawful obstruction to a public street, he may maintain an action in equity in his own behalf for damages and an injunction. Such was the case of Callanan v. Gilman, supra, upon which the courts below relied in rendering judgment in this action, and which we also regard as analogous and controlling. In that case, as in this, the obstruction consisted in unloading trucks over a sidewalk, and pedestrians were forced by the inconvenience to take the opposite side of the street. The proof of special damages sustained by that plaintiff was slight, but the court held that direct proof of peculiar damage was not needed if the circumstances showed it, and that he suffered some special damages not common to persons merely using the street for passage was declared to be too obvious for reasonable dispute. The right to maintain the action does not depend on the amount of the special damage, provided the plaintiff suffered some material injury peculiar to himself. Pierce v. Dart, 7 Cow. 609. We think that, in

a populous city, whatever unlawfully turns the tide of travel from the sidewalk directly in front of a retail store to the opposite side of the street is presumed to cause special damage to the proprietor of that store, because diversion of trade inevitably follows diversion of travel. The nature of this case was such that the amount of damages could not be shown, and hence the remedy at law would not only be inadequate, but would lead to a multiplicity of suits. While the defendant was doubtless careful to interfere with the rights of the public no more than was necessary for the convenient transaction of his business with the facilities that he had, still he could not lawfully supply the defects in his premises by virtually monopolizing the sidewalk for several hours every day. As the court said in Rex v. Russell, 6 East, 427, he "could not legally carry on any part of his business in the public street to the annoyance of the public," nor could he "eke out the inconvenience of his own premises by taking in the public highway." Rex v. Jones, 3 Camp. 230. Whether a particular use of a street is an unreasonable use or not is a question of fact depending on all the circumstances of the case. Hudson v. Caryl, 44 N. Y. 553; St. John v. Mayor, etc., 6 Duer, 315; Wood, Nuis. § 251. The trial court found as a fact that the defendant's use of this sidewalk was an unreasonable interference with the passage of the public along the same. Hence he was properly held guilty of creating a nuisance, for the habitual use of a sidewalk or highway in an unreasonable manner, to the serious inconvenience of the public, is a nuisance per se. 16 Amer. & Eng. Enc. Law, p. 937. The evidence was ample to support the finding, as the use of the sidewalk by the defendant was systematic and exclusive during a substantial part of the business day. The primary purpose of the sidewalk was violated, and the people who wished to use it to walk upon were compelled to walk around through the street, and avoid the passing vehicles as best they could. This is scarcely denied by the learned counsel for the defendant, who contends that no unreasonable use or occupation of the sidewalk was shown so far as the plaintiff is concerned, and that he cannot complain, although the public might. It is true that no direct interference with the plaintiff's premises or business was shown. The pecuniary loss to him was caused by the indirect effect of the obstructions to the sidewalk upon the public; but when an unreasonable use of a public highway is shown, and it also appears that such unreasonable use causes special damages to an individual, he has a personal right of action to compel the abatement of the nuisance. Doolittle v. Supervisors, 18 N. Y. 155; Corning v. Lowerre, 6 Johns. Ch. 439; Spencer v. Railroad Co., 8 Sim. 193; Sampson v. Smith, Id. 272; Crowder v. Tinkler, 19 Ves. 617. While the general welfare is promoted by manufactories such as the defendant carries on, and they should not be in-

terfered with for light or trivial causes, still the right of the public to the use of the sidewalk is paramount, and he must so arrange his business as not unreasonably to interfere with it. The decree against him conforms in every respect to the precedent established by this court in *Callanan v. Gilman*, 107 N. Y. 360, 373, 14 N. E. 264, when it modified the judgments of the courts below by restraining against an unnecessary or unreasonable obstruction. While the language of the injunction is somewhat indefinite, owing

to the care taken not to interfere with important private rights, still a reasonable man will have little difficulty in determining what is a reasonable use of a public street. A prudent man will resolve doubtful questions in favor of the public, and against himself, and the wrong to the public is the basis of the plaintiff's right to relief, although a special injury to himself was also required before he could succeed. We see no reason for reversing this judgment, which is therefore affirmed, with costs. All concur.

BOWES v. CITY OF BOSTON.

FEGAN v. SAME (three cases).

(29 N. E. 633, 155 Mass. 344.)

Supreme Judicial Court of Massachusetts. Suffolk. Jan. 8, 1892.

Exceptions from superior court, Suffolk county; James R. Dunbar, Judge.

These were actions of tort, tried together, brought to recover damages from the city of Boston for injuries caused by the same accident. The first was brought by Mrs. Bowes, to recover for injuries to her person; the second, by Mr. Fegan, for damages to his horse, carriage, and harness; the third, by Fegan, administrator, to recover damages for the pain and suffering endured by his intestate and mother, Mrs. Fegan, prior to her death, which took place some four weeks after the accident; the fourth was brought by the administrator under section 17, c. 52, Pub. St., to recover damages for the death of Mrs. Fegan. The accident in question was caused by a horse, which Mrs. Bowes was driving, overturning the carriage in which she and Mrs. Fegan were riding. Verdict for the plaintiff in each case. Defendant excepts. Exceptions sustained.

J. D. Long, for plaintiffs. R. W. Nason and T. M. Babson, for defendant.

KNOWLTON, J. These are four suits, tried together, in all of which the defendant's liability depends on the same facts. Our discussion of the first will be equally applicable to the others also.

The only ground on which the plaintiff seeks to recover is that the horse which she was driving shied at a pile of stones, and passed to the opposite side of the road, so that one of the wheels of the buggy scraped against a stone in another pile there, making a loud noise, but not diverting the carriage from its course, or causing it to tip, or in any way disturbing its equilibrium; that her horse was frightened at the noise, and started up, and after trotting fast a short distance, and going between trotting and running, broke into a run, and in turning a corner threw her out, and caused the injury. The notice given to the defendant stated the defect and cause of the injury to be "large stones extending about six feet into the traveled part of said way, * * * piled within the traveled way in such grotesque and unusual shape that they constituted a nuisance by their liability to frighten horses." An injury resulting from such a cause is not one for which a city or town is liable, and the jury were instructed at the trial that, in order to recover, the plaintiff must satisfy them that a collision with the pile of stones was the sole cause of the accident. The notice gave the authorities of the city no reason to expect that the plaintiff would present at the trial such a case as that on which she finally

relied. They might well assume that the statement in the notice was true, and that the plaintiff claimed damages on account of an accident caused by the fright of her horse at a pile of stone of such a grotesque and unusual shape as to be likely to frighten horses. The giving of a proper notice, stating the time, place, and cause of the accident, is a condition precedent to recovering in cases of this kind. *Gay v. Cambridge*, 128 Mass. 387; *McDougall v. City of Boston*, 134 Mass. 149. Under the statute of 1882, c. 36, which was repealed and re-enacted by the statute of 1888, c. 114, a notice defective in either of these particulars is sufficient if it is shown "that there was no intention to mislead, and that the party entitled to notice was not in fact misled thereby." Under this statute the burden of proof is on the plaintiff to show that the defendant was not misled by the notice, as well as that there was no intention to mislead. This may often be inferred from the circumstances, without testimony directly to the point. But in the present case the notice was of a kind which would have a direct tendency to mislead; and there was no evidence tending to show that the authorities were not misled by it, or that they "ever, until the time of the trial, had a different account of the accident than the one given in the notice." Such a notice, and such an investigation as the authorities would naturally make on account of it, would be likely to lead them to rest their defense on the legal proposition that cities are not liable for accidents caused by the fright of horses from objects of a grotesque or unusual appearance in the street. As is said in *Fortin v. Easthampton*, 142 Mass. 486, 8 N. E. 328, a misstatement is more likely to mislead than no statement at all. We are of opinion that there was no evidence on which the jury could find that the notice was sufficient to enable the plaintiff to recover for an injury caused by a collision with the pile of stones, and that the ruling requested on this point should have been given.

In the last two suits the court was right in refusing to rule that the administrator could not recover in both actions if he proved the facts alleged in both. The right of action given by Pub. St. c. 52, § 17, is independent of the right of action given by section 18 of the same chapter. The statute creating it was enacted at a different time, and for another purpose. The right to recover damages suffered in his life-time by one who dies from an injury received on a highway survives to his administrator for the benefit of his estate, and the damages are estimated on the theory of making compensation. Pub. St. c. 165, § 1. The action by an administrator under section 17 on account of his intestate's loss of life is to recover a sum not exceeding \$1,000 for the benefit of the widow and children or of the next of kin of the deceased, to be estimated according to the degree of culpability of the defendant. Both actions, un-

der the statute, may proceed at the same time on independent grounds, and for different purposes.

The defendant contends that the jury could not find that the grating of the wheel upon the stone was the proximate and sole cause of the accident, even if the horse was frightened by it. There is certainly very little to show that the sound was the cause of the accident. On the plaintiff's theory the horse was so frightened by the first pile of stones as to pass out of control of the plaintiff far enough to bring the wheel in contact with a stone in the other pile on the opposite side of the street, and, after the sound caused by the contact, the evidence tended to show that for a considerable distance he was not running, and that he afterwards began to run. No accident occurred until he reached March avenue, 428 feet from the pile of stones. This avenue led to the stable where he was kept, and he had an inclination to turn into any street leading directly to his stable when he came near it, so that it was difficult to restrain him from so doing. In turning into March avenue the buggy was upset. But, on the whole evidence, it was a question of fact for the jury whether the increased speed of the horse was caused by fright from the sound; and, if they found that it was, they might also find that the sound was the direct and proximate cause of the accident, even if there were concurring conditions, as distinguished from active causes, without which the accident would not have happened. We are of opinion that there was no error in submitting this question to the jury.

We now come to the most difficult part of the case. The defendant contends that fright from a sound produced by the scraping of a wheel against the side of a stone is not different in its legal character from fright at the sight of the stone. It is well settled in this commonwealth that cities and towns are not liable for injuries caused by the fright of horses from objects in the highway, even if the object is one that would be ever so likely to frighten horses. Can it make any difference whether the fright is from sight or sound? In general, and on principle, we think the answer should unhesitatingly be "No." In *Keith v. Easton*, 2 Allen, 552, it is said that "in no case has it been held that an object existing within the limits of a highway * * * is a defect in the way merely because it exposes the traveler's horse to become frightened by the sight of it either at rest or in motion, or by sounds or smells that may issue from it." Fright from sound is put in the same category with fright from sight. See, also, *Lincoln v. City of Boston*, 148 Mass. 578, 20 N. E. 329. Does it make a difference that the sound is produced by

touching the object in passing, without causing the least obstruction to the passage or disturbance of the equilibrium of the vehicle? It is a part of the adjudication in *Cook v. City of Charlestown*, 98 Mass. 80, that it can make no difference "that the object which frightened the horse is one that would have been an obstruction and defect in the way if it had come in contact with it. It is not its quality as an obstruction which causes the injury of the plaintiff, but its quality as an object of terror to horses." Under that decision, it makes no difference in the present case that the stones were so near the center of the way that, if the plaintiff had driven against them in such a manner as to be obstructed in passing and thrown out, they would have been a defect. As an obstacle over which travelers could not pass in safety, they were a defect; but it was not their quality as an obstruction which caused the injury, but their quality as an object which might frighten horses by sound if grazed by a vehicle passing by. The contact was not of the kind in reference to the possibility of which the stones constituted a defect. Would it make any difference if the sound which frightened the plaintiff's horse had been produced by contact of a vehicle drawn by another horse? We think not. Moreover, even if cities and towns were liable for injuries caused by the fright of horses from objects which would be likely to frighten them by sound, this was not such an object. No one would have said that the danger of an accident from fright of a horse at a sound produced by contact with the stone was so great as to make the stone a defect. Of late it has been the policy of the law not to hold cities and towns to so large a liability as existed under the earlier legislation, and we do not deem it wise to enlarge the class of cases in which there may be recovery against them. A road may be very dangerous on account of objects in it which are likely to frighten horses; and the court, in deciding *Kingsbury v. Dedham*, 13 Allen, 186, and the other cases above cited, might have held the defendants liable, by interpreting the statute more liberally in favor of the plaintiffs. But we think the construction adopted was founded on sound public policy, and that the present case falls within the principles heretofore laid down by this court. We are disinclined to hold that contact with a stone, which was merely a touch, and which produced none of the effects in reference to which stones would be deemed a defect, but only effects in reference to the production of which objects in a way are not defects, makes the case any stronger for the plaintiff than if the same effect had been produced without contact. Exceptions sustained.

SCOVILLE v. SALT LAKE CITY.

(39 Pac. 481, 11 Utah, 60.)

Supreme Court of Utah. Feb. 23, 1895.

Appeal from district court, Salt Lake county; before Justice George W. Barch.

Action by Edward P. Scoville against Salt Lake City. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

E. D. Hoge and Ed. F. Coad, for appellant. Powers & Straup and Denton & McNally, for respondent.

MERRITT, C. J. This action was brought by respondent against the appellant to recover damages for an injury sustained by his child, a boy aged 18 months, at the time of the accident, near the Western Union Telegraph Office, in Salt Lake City, on the east side of Main street. Ice had been allowed to accumulate on the sidewalk, caused by the freezing of water which came down a conductor and a waste pipe leading from a sink, and was allowed to flow out and over the sidewalk. The conductor had been there a long time, and the water flowing from thence would freeze and thaw as the weather was cold or warm. The conductor was about four inches in diameter, made of tin, and was used to carry off the rain or snow as it melted from the roof of the building adjoining the walk. The sidewalk at this place was also sloping or slanting to the south, and also towards the curb, making it all the more dangerous and slippery when the water froze. At the time of the accident, the ice covered a space of two or three feet wide across the sidewalk diagonally towards the curb, and was from one to fifteen inches thick, measuring from the curb up to the mouth of the conductor. At the time of the accident, a slight snow was and had been falling for several hours, which in a large measure covered and obscured the ice. On the 7th day of January, 1892, in the afternoon, about 5 o'clock, respondent's wife was walking along the sidewalk at a usual gait, carrying the child in her arms, and, when she reached this place covered with ice, slipped and fell as she walked upon it. In falling, the child was thrown with considerable force to the walk, striking with its back on the sidewalk, from which the child received an inguinal rupture.

At the conclusion of the testimony for the respondent, appellant moved the court for a nonsuit, and the motion was denied, and appellant rested the case without introducing or offering any evidence. After argument by counsel, the court charged the jury, and they retired to consider of their verdict. Later they returned into court for further instruction, and the court, in open court, and in the presence of counsel for the respective parties, further charged the jury. The whole charge, as given in open court, was, at the request of the jury, sent to their room in

writing. The jury rendered a verdict in favor of the respondent. Appellant's motion for a new trial was denied, and this appeal is prosecuted from the order refusing a new trial, and from the judgment.

The errors assigned and relied on are: First. The evidence was insufficient to sustain the verdict or any verdict for respondent, and appellant's motion for a nonsuit should have been granted. Second. The court erred in refusing to give the requests of appellant. Third. The court erred in permitting its written charges to be sent to the jury.

That the ice in question was not the result of snow or rain falling or dripping from eaves, and not from any natural cause, but was caused from water discharged on the sidewalk by means of a conductor used to carry water from the roof of the building, and, too, by a defective one, and from a waste pipe, is clear from the evidence. The ice was the result of an artificial, and not a natural, cause. There is no evidence at all to sustain appellant's contention that the ice was the result of the prevailing weather, and not one witness in the case so testified. Where a corporation permits the discharge of water from adjoining houses to be obstructed, or permits the water to be discharged on its walk by some artificial means, and there allowed to freeze, in such case its own act of wrongdoing contributes to the accumulation of the dangerous ice, and the corporation will be held liable. Here the ice is the result of an artificial, not of a natural, cause. Where a municipal corporation has permitted ice and snow to accumulate and remain upon sidewalks of a large city in the business part thereof for an unreasonable time, in a rounded, uneven, and dangerous condition, and an injury occurs by reason thereof to one who is properly using the walk, the municipality is liable. *Elliott, Roads & S. p. 459; Collins v. Council Bluffs, 32 Iowa, 324; McLaughlin v. City of Corry, 77 Pa. St. 109; Luther v. Worcester, 97 Mass. 268; Morse v. Boston, 109 Mass. 446.* In this case the evidence shows that there was ice at the point mentioned on the sidewalk all winter, and this ice was there accumulating from December to January 7th, the time of the injury.

The question of notice to appellant was one of fact for the jury to determine, and not a question for the court. *Elliott, Roads & S. p. 461; Dill. Mun. Corp. § 1026.* In Wisconsin, where a defect in a sidewalk existed one day, and in Massachusetts, where a defect in a highway existed 13 hours, and in Connecticut, a few hours from frozen water, it was held that it was for the jury to determine whether that constituted sufficient notice. *Howe v. City of Lowell, 101 Mass. 99; Sheel v. City of Appleton, 49 Wis. 125, 5 N. W. 27; Gaylord v. City of New Britain, 58 Conn. 398, 20 Atl. 365.* This defect and accumulation of ice was on the most-traveled walk in the city. The question of notice is not

alone determined from the length of time a defect has existed, but also from the nature and character of the defect, the extent of the travel, and whether it is in a populous or sparsely-settled part of the city. Besides, there is, in this case, evidence tending to show actual notice to the city. The question as to whether the acts and conduct of appellant, and the facts, as shown by the evidence, constitute negligence was one for the jury to pass upon. *Bowers v. Railroad Co.*, 4 Utah, 215, 7 Pac. 251. The court, therefore, did not err in submitting the case to the jury.

The charge of the court correctly stated the law in the premises, and all the requests of appellant were substantially given in the charge of the court. Appellant, however, is not in a position to avail itself of any error in the charge of the court, should there be any, for it has not properly made and saved its exceptions. The only exceptions taken by appellant are: "In this case we desire to have an exception to each paragraph of the charge of the court; also save our exceptions to the refusal of the court to give the instructions asked for by the defendant." This court has held that such exceptions are too general, both for an exception to the charge as given and for the requests refused. *Marks v. Tompkins*, 7 Utah, 421, 27 Pac. 6. General exceptions to all the instructions are of no effect, and will not be considered if any portion of the charge is correct. Exceptions must be specific to the particular instructions. *Nelson v. Brixen*, 7 Utah, 454, 27 Pac. 578; *Cooper v. Schlesinger*, 111 U. S. 148, 4 Sup. Ct. 360; *Railway Co. v. Jurey*, 111 U. S. 584, 4 Sup. Ct. 566. An exception to each and every part of the charge is too general. It has been too frequently decided in this court to require authorities to sustain the proposition that where the charge gives the substance of the requests for instructions, or where the charge as a whole covers the questions embraced in the requests, it is not error to refuse the requests, even though technically good in law. In such case the court

is not bound to use the language of counsel, but may use its own. This has uniformly been the practice in this territory, and is sustained by the supreme court of the United States. *People v. Chadwick*, 7 Utah, 141, 142, 25 Pac. 737; *Cunningham v. Railway Co.*, 4 Utah, 206, 7 Pac. 795; *People v. Olsen*, 4 Utah, 413, 11 Pac. 577; *People v. Hampton*, 4 Utah, 258, 9 Pac. 508; *Clampitt v. Kerr*, 1 Utah, 247; *Railroad Co. v. Horst*, 93 U. S. 291; *Laber v. Cooper*, 7 Wall. 565.

The court did not err in permitting the jury to take to their room the charge of the court after it was reduced to writing. All the charge was given in open court, and in presence of counsel for both parties. That it is proper to allow written instructions to go to the jury room, see *People v. Cummings*, 57 Cal. 88. In the absence of contrary statutory direction on the subject, the instructions given by the court to the jury in writing may, in the discretion of the court, be taken with them to their room when they retire to deliberate.

Differences of climate and locality are to be considered in determining the liability of municipalities for their failure to exercise care in removing ice and snow from their walks. Each case must be considered with reference to the climate of the place. In Minnesota, where snow and ice exist almost constantly through the winter season, to require municipalities to keep their walks absolutely free of ice and snow would be highly unreasonable. But in other localities and in a warmer climate, like Utah, where snow and ice, although not unusual, are by no means continuous, to require the municipalities to keep their walks free of ice and snow, especially in particular localities, is by no means unreasonable. *Jones, Neg. Mun. Corp.* § 100.

Upon a full examination of the case and authorities cited, we are of the opinion that the judgment should be affirmed; and it is so ordered.

SMITH and KING, JJ., concur.

KANNENBERG v. CITY OF ALPENA.

(55 N. W. 614, 96 Mich. 53.)

Supreme Court of Michigan. June 16, 1893.

Error to circuit court, Alpena county; Robert J. Kelley, Judge.

Action by Herman Kannenberg against the city of Alpena for personal injuries caused by slipping down on the ice on a highway. From a judgment for defendant, entered upon a verdict directed by the court, plaintiff brings error. Affirmed.

W. E. Depew, for appellant. J. D. Turnbull, for appellee.

HOOKER, C. J. Plaintiff brought an action against defendant to recover damages for a personal injury, occasioned by slipping down upon the ice on a highway. It is contended by defendant's counsel that the evidence conclusively shows that the plaintiff was not upon the sidewalk when he slipped. No witness swears clearly that he slipped upon the sidewalk, but the plaintiff stated once in his testimony that he was on the sidewalk when he fell. We shall therefore treat the question as one for the jury. The trial judge directed a verdict for defendant upon the ground that there was no evidence that the street was not in a reasonably safe condition for travel. The street had been recently paved, in the course of which the center of the highway was made higher than the existing sidewalks. It had previously been somewhat lower. The street was paved with cedar blocks, so laid as to make a

gutter outside of the sidewalk. In this gutter was a catch-basin for the sewer, close to the place of the accident. This catch-basin had become filled up or stopped, so that the water did not run off, and, the weather being warm, the water accumulated at that point, and flowed upon the outer edge of the sidewalk, where it froze, and, it being covered with manure and dirt, plaintiff fell, and was injured.

It is claimed that defendant did not keep its walk in a reasonably safe condition for travel. Unless the municipalities of the state are to be made insurers against accident, it is difficult to see how the plaintiff can be permitted to recover. Just what duty the city neglected is not stated. By the paving improvement, the water flowed upon the sidewalk and froze. Had it not been made, it would have flowed upon the road, where it would have frozen, and made it possible for an accident to have happened there. No fault is found with the construction of the catch-basin, and upon the whole record it is plain that from natural causes, without fault upon the part of the city authorities, some ice formed from the snow which fell in the highway. No liability attaches under such circumstances. Some cases have been cited in support of the plaintiff's claim, but they relate to instances where, by neglect of the hydrants or waterspouts, water was permitted to drop upon the walk, where it froze. These cases are clearly distinguishable from the case before us. The judgment must be affirmed. The other justices concurred.

HAZZARD v. CITY OF COUNCIL BLUFFS.

(53 N. W. 1083, 87 Iowa, 51.)

Supreme Court of Iowa. Jan. 18, 1893.

Appeal from district court, Pottawattamie county; A. B. Thornell, Judge.

Action to recover damages for injuries to the plaintiff's horse, by reason of the alleged negligence of the defendant in constructing an insufficient culvert in a street of the city, which caused the street to overflow and become obstructed with mud, rubbish, stones, bricks, and other refuse matter. There was a trial by jury, which resulted in a verdict and judgment for the plaintiff. Defendant appeals.

J. J. Stewart, for appellant. Flickinger Bros., for appellee.

ROTHROCK, J. The argument of counsel for appellant proceeds upon the theory that the evidence does not show that the city was negligent in the construction of the culvert, and in permitting brickbats, brush, and other rubbish to remain in the street. It cannot be a subject of debate that the culvert was insufficient to carry off the water which came down from the adjacent land. The fact is undisputed that the culvert became clogged up, and that the water washed over the street, and deposited brickbats and other rubbish upon the surface of the street; and there is evidence in the case from which the jury were authorized to find that there was a ditch or depression in the street, caused by the action of the water which should have been carried off through the culvert; and there was also evidence to the effect that much of this rubbish which obstructed the street had been there for sufficient time to authorize a finding that it must have come to the knowledge of the officers of the city who were charged with the duty of keeping the streets in repair, and in suitable condition for travel. This being the state of the case, there can be no doubt that the city was liable for the injury, unless the plaintiff failed to show that the person in charge of the horse was free from contributory negligence in riding the horse on and over the obstructions in the street. The evidence shows that the plaintiff's horse was injured by stepping on a brickbat which rolled under his foot, and by reason of the rolling motion of the brick the leg of the horse was broken. It is claimed that the brickbats in the street were plainly visible, and that the rider of the horse should have avoided them. The jury found specially that a part of the obstructions and defects in the street were in plain view of the person in charge of the horse. This finding was warranted by the evidence. The brickbats, or most of them, were shown to be in plain view; but there was evidence tending to show that there was a ditch and brush and other rubbish under the brickbats, which the jury, no doubt, believed were the real cause of the rolling of

the brickbat upon which the horse stepped and was injured. A careful examination of the evidence leads us to the conclusion that the jury were warranted in finding that the person in charge of the horse was shown to be free from contributory negligence. These general observations practically dispose of this appeal. The case has once before been in this court, upon an appeal by the plaintiff. See 79 Iowa, 106, 44 N. W. 219. At the last trial the court appears to have tried the case in accord with the opinion on the former appeal.

Appellant's counsel complain of the refusal to give certain instructions to the jury, upon the request of the defendant. The instructions which were given by the court on its own motion covered every conceivable question in the case, and there was no necessity for further instruction. It is claimed that certain parts of the charge to the jury were erroneous. We discover no ground for disturbing the judgment on this ground. The charge, taken as a whole, is a correct exposition of the law of negligence, as applied to the facts disclosed in evidence.

Special objection is made to the following language, used by the court in the instructions: "But actual notice need not be shown in all cases. It may be inferred from the notoriety of the defect, or from its being so visible and apparent, and having continued for such length of time, as that, in the exercise of reasonable observation and care, the proper officers of the city ought to have known of and remedied or removed the defect or obstruction. The evidence in this case fails to show actual notice of the defect or obstruction complained of, if same existed, to the defendant or its officers; but if the evidence shows that such defect or obstruction had existed for such length of time, and was so visible and apparent, as that the officers and servants of the defendant ought, in the exercise of ordinary care and observation, to have known of and remedied or removed same before the time of the accident in question, this would be sufficient to show that the defendant was negligent in permitting such defects or obstructions to remain at the time of the accident; but unless the evidence does show that said defects or obstructions were caused by the negligence of the defendant in constructing the culvert at the place in question, as before explained, or that same were of such notoriety, or had existed for such length of time, and were visible and apparent before the accident, as that the officers and servants of the defendant, in the exercise of ordinary care and observation, ought to have known of and remedied or removed said defects or obstructions, the defendant cannot be charged with negligence on account thereof, and the plaintiff cannot recover in this case." The objection to this part of the charge is that the defendant is thereby made liable if a mere servant of the corporation knew of the defect, or

could, with reasonable diligence, have discovered it. The part of the charge above set out, when considered throughout, will not bear the construction contended for. Its whole scope and meaning is that if the "proper officers of the city ought to have known of and remedied or removed the defect or obstruction," and did not do so, then the city was chargeable with negligence. The use of the word "servants" could not have been understood by the jury as other

than representatives of the city charged with some duty with reference to maintaining the streets in proper condition for travel. The case requires no further consideration. We have disposed of it in this general way because, as it appears to us, there is no real ground for objection to any ruling of the court, and we are satisfied that the verdict of the jury finds support in the evidence.

The judgment of the district court is affirmed.

DAVENPORT v. CITY OF HANNIBAL.

(18 S. W. 1122, 108 Mo. 471.)

Supreme Court of Missouri, Division No. 2.

March 2, 1892.

Appeal from circuit court, Monroe county; Thomas H. Bacon, Judge.

Action by David G. Davenport against the city of Hannibal to recover damages sustained by reason of a personal injury to his wife, Fanny C. Davenport, caused by the defective condition of defendant's street. From a judgment for plaintiff, defendant appeals. Affirmed.

D. H. Eby, for appellant. A. M. Alexander and R. E. Anderson (Harrison & Mahan, of counsel), for respondent.

MACFARLANE, J. This is an action by plaintiff, husband of Fanny C. Davenport, to recover damages from defendant for loss of the services of his wife, and expenses of nursing and treating her on account of personal injuries resulting from the alleged negligence of the defendant in not keeping its streets in proper condition. The charge in the petition is that defendant maintained a sidewalk on the west side of Fourth street in said city, and where that street intersected Washington street it had undertaken to maintain a crossing over Washington street. That on the margin of Washington street, between the end of the sidewalk and the beginning of the crossing, a space had been left open for the passage of the surface water, and as a crossing of this water-way large stepping-stones had been planted. That the crossing of this water-way was negligently permitted to become "greatly out of repair, so that between the southern terminus of said crossing on Washington street, as the same was laid on the surface thereof, and the nearest stepping stone in said water-way, there was an opening about 26 inches in width and 20 inches deep, with the sides thereof precipitous, with no apron or covering over the same, without protection, and without any light or signal to indicate danger; so that the same was on, and had been for a long time prior to, said 10th day of November, 1885, not reasonably safe for ordinary travel, of which said condition of said crossing defendant had notice." The petition further charged that on the 10th of November, 1885, the wife of plaintiff came to the city of Hannibal for the purpose of visiting her married daughter, then living on the westerly side of said Fourth street, and south of said Washington street. That after dark on the evening of said 10th day of November, 1885, she, on her way to her said daughter's, started to cross said Washington street at the crossing aforesaid, going south, and was wholly unaware of the said condition of said crossing, presuming that the same was on a continuous level, there being no light or signal to indicate danger, when she unexpectedly stepped down and into said opening, and was violently thrown to the ground, from which she received

serious injuries, making necessary the amputation of one of her legs, after long suffering and disability. "That by means of the premises the said Fanny C. Davenport, for a long space of time, to-wit, ever since the receiving of said injuries, has been unable to perform her ordinary duties as the wife of said plaintiff. That plaintiff has been deprived not only of her services and society, but was put to great expense, and did pay out a large sum, to-wit, the sum of six hundred dollars, in and about the nursing and taking care of his said wife, and for medical attendance on her, and has suffered great distress of body and mind, besides being hindered and damaged in his business on account of the precarious condition of his said wife, produced by said injuries." The answer was a general denial and a special plea of a former trial of the issues as to the liability of the city for injuries to Mrs. Davenport in a suit by her against the defendant, in which a judgment was rendered for defendant. No point is made in this answer, and no further consideration will be given to it. No question is made as to the sufficiency of the evidence to support the verdict. We have read the evidence carefully, and think it tends to prove each issue tendered by the petition, and we will not state the evidence in detail.¹

* * * * *

2. Complaint is made that the court refused to give instruction 4, asked by defendant. That instruction, in effect, told the jury that, if the damage to plaintiff's wife was caused by a failure on the part of defendant to maintain a proper light in the vicinity of the point at which the defect was permitted to exist, and that defendant had previously kept and maintained such light, then, unless defendant had actual notice of the absence of such light at the time plaintiff's wife fell, "in time to have enabled it, in the exercise of reasonable diligence and attention, to have supplied the same before the said Mrs. Davenport fell, or that on the evening in question the absence, if any, of such light had existed for such a period of time as to impart such notice to defendant, the jury will find for the defendant." We do not think the principle that a city is entitled to notice of a defect in a street, and a reasonable time in which to make repairs, before it can be held for damages resulting from such defect, applies to an omission of duty of the character here shown. The negligence in failing to maintain a light consisted in a failure to discharge a known duty, and not in a failure to know that a duty was required. Defendant knew that when the darkness came the light was needed. The neglect of defendant's agent to light the lamp was the neglect of defendant itself. The city was not entitled to notice that its agent had neglected his duty. *Russell v. Columbia*, 74 Mo. 480.

3. It is insisted that the court, by its instruction, given on its own motion, submitted to

¹ Part of the opinion is omitted.

the jury the question of law as to whether the plaintiff had a cause of action. This is the instruction complained of: "The court, of its own motion, on plaintiff's behalf, instructs the jury that, although aggravation of Fanny C. Davenport's alleged injuries, if any, by the negligence, if any, of said Fanny C. Davenport or of her professional attendants, cannot be allowed to increase the estimate of plaintiff's damages, if any, yet, if the jury find that at the time the alleged accident occurred the plaintiff, under the instructions herein, became vested with a cause of action against defendant therefor, no such subsequent aggravation, if any, of her said injuries can take away plaintiff's cause of action, or authorize a verdict against plaintiff." The other instructions given by the court fairly and fully set out the facts which it was necessary should have existed in order to make a cause of action in favor of plaintiff's wife. Now, if for the court to say that, under the instructions given, Mrs. Davenport "became vested with a cause of action" at the time of her injury, is not a submission to the jury of the legal question whether she had a cause of action, the jury, by the other instructions, are clearly told what facts would constitute a cause of action; and by this instruction they are told that, if such cause of action accrued in the first place, it was not defeated by any subsequent negligence of plaintiff's wife or of her professional attendants.

4. Objection is made to the first instruction given for plaintiff, the part objected to being as follows: "If the jury find from the evidence that said crossing was not so reasonably safe for ordinary travel as aforesaid, at the time of the alleged injury, to-wit, on the night of the 10th day of November, 1885, by reason of an opening between the stones in said crossing erected for and used as stepping-stones therein; and further find that the defendant had notice of such defect in such crossing, or that the same had existed for a time prior to the time of said alleged injury, reasonably sufficient to have enabled the defendant to have ascertained the fact, and remedied said defect, and further find that on the night of said day last aforesaid the said plaintiff's wife, Fanny

C. Davenport, while walking over said crossing, and while in the exercise of ordinary care and attention, fell into said opening, and was thereby injured, and that her said fall and injury was caused by said alleged defect in said crossing, then they must find for said plaintiff." The objection to this instruction is that, while it purports to cover the whole case, it is so framed as to exclude from the consideration of the jury the fact as to whether a street lamp was maintained in the vicinity of the accident at the time of its occurrence. We do not think the instruction open to the criticism. The proximate cause of the injury was the defective street, and not the absence of a light. Maintaining a light 75 feet away, as had been done, would not have excused defendant for suffering the defect in the street to exist. If a proper light had been there, it might have warned Mrs. Davenport of the danger, and she might have avoided it. The presence or absence of a light only bore on the question of the care used by Mrs. Davenport. If she used due care, and was still injured, the defendant would have been liable, though the light had been burning. The instruction required the jury to find that Mrs. Davenport was in the "exercise of ordinary care and attention" when injured, before they could find for plaintiff. *Loewer v. Sedalia*, 77 Mo. 445. We think the whole case was very fairly submitted to the jury under the instructions.

5. Complaint is made that the verdict is so excessive as to indicate prejudice and passion on the part of the jury. The evidence shows that as a result of the injury the bones in one of Mrs. Davenport's legs became diseased, and finally, after two years of care and nursing and attention of physicians and surgeons, the limb was amputated. Plaintiff was required to pay large sums for doctor's fees, for medicine, and for nursing, besides being required himself to devote much of his own time to nursing and caring for her, to the neglect of his private business. This continued for three years from the time of the injury. We cannot say, as a matter of law, that the damage allowed under the verdict was excessive. It was a question properly submitted to the jury. Judgment affirmed. All concur.

TUCKER et al. v. SALT LAKE CITY.

(37 Pac. 261, 10 Utah, 173.)

Supreme Court of Utah. June 12, 1894.

Appeal from district court, Salt Lake county; before Justice C. S. Zane.

Action by Elizabeth B. Tucker and her husband against Salt Lake City. Plaintiffs obtained judgment. Defendant appeals. Affirmed.

E. D. Hoge, for appellant. Frank B. Stephens and Benner X. Smith, for respondents.

MERRITT, C. J. This action was brought by plaintiff and her husband, who has since died, against the city of Salt Lake. The complaint alleges that on or about the 1st day of August, 1890, in front of the livery stable formerly known as McKimmin's stables, on the north side of Third South street, between Main and West Temple streets, the said city made, constructed, and caused to be constructed and put down an iron, glass and cement sidewalk, a portion of which was negligently, willfully, and knowingly constructed on a sharp incline, making a steep and slippery descent, dangerous, etc.; that plaintiff, when passing along said sidewalk, was unaware of danger, stepped on said incline, without fault or negligence on her part, was thrown upon the sidewalk, and broke her arm, etc., for which damages were claimed in the sum of \$4,500. The answer denied all the allegations of the complaint. A trial was had before the court and a jury. The jury rendered a verdict in favor of plaintiff for the sum of \$2,000, and judgment was rendered by the court in favor of plaintiff for said sum and costs. Defendant moved for a new trial, which was overruled, whereupon defendant appealed, and assigned as error the failure of the court below to give certain instructions asked by defendant, and also excepted to the charge given by the court to the jury.

From a careful examination of the record, we find no error; the charge of the court below was full, and stated correctly the law of the case. The court charged the jury "that the defendant had put in an answer denying the allegation as to negligence on the part of the city, and the burden of proof is on the plaintiff to show by a preponderance of evidence the negligence charged in the complaint; that it was the duty of the city to use all reasonable care to keep and maintain the sidewalk in a reasonably safe condition to persons passing upon it, and if the city knowingly failed to do so it is chargeable with negligence. Though there may not be any actual notice to the city, or any of its authorized officers whose duty it is to repair the sidewalks and remedy dangerous places, yet if you believe from a preponderance of evidence that the danger had remained there any length of time; that the city officers whose duty it was to examine

sidewalks and repair them, in the use of reasonable diligence, should have discovered the danger,—then you have a right to infer notice to the city." The court further instructed the jury that if they believed, from a preponderance of the evidence, that the city permitted this dangerous sidewalk, as alleged in the complaint, to remain in the street, after the city officers whose duty it was to repair the streets knew of it, or should have known of it in the use of reasonable diligence, and if they further believed that the plaintiff, without fault on her part, and with the use of due care, while walking along the street, stepped upon the incline, as described in the complaint, and was thrown down and suffered injury as alleged, then that they should find for the plaintiff. The court further charged the jury that it was the duty of the plaintiff to use ordinary care, in passing along the street, to see and observe any dangerous places in the street, and if they believed, from a preponderance of the evidence, that she was guilty of negligence in stepping on such a dangerous place,—“if you believe from the evidence it was,—which contributed to the injury, then she cannot recover.” The court further charged the jury that it was their province to determine, from all the evidence, in the first place, whether the danger existed, and whether the city had notice of it; as to whether it was dangerous to persons walking along with ordinary care; and as to whether the plaintiff used reasonable care. These charges, we think, fully and fairly stated the law of the case, and were quite as favorable to the defendant as the law would justify.

We have examined the proposed instructions asked by defendant and which were not given by the court, and find that their substance was already given by the court in its charge, with the following exception, viz.: The defendant asked the court to charge the jury that, “if you find from the evidence that the sidewalk where the plaintiff Elizabeth Tucker, was injured, was of sufficient width, and in such safe condition, that the said plaintiff, Elizabeth Tucker, by the use of ordinary care, could have avoided the injury complained of, you must find for defendant,”—which the court refused to give, and which ruling was excepted to by defendant, and who now assigns the same as error. The court properly refused to give said instruction, because it was an assumption on the part of appellant that as a matter of law the whole width of the sidewalk need not be in good condition, and that a city is not compelled to keep the whole width of the sidewalk in good condition. That is not the law. “Where a city opens a sidewalk to public travel, it is bound to keep every portion of it in repair.” *Roe v. City of Kansas* (Mo. Sup.) 13 S. W. 404; *Morrill, City Neg.* 67; *Brusso v. City of Buffalo*, 90 N. Y. 679. All persons using streets and sidewalks have the right to assume that they are in good and

safe condition, and to regulate their conduct on that assumption. *Kenyon v. City of Indianapolis* (Ind.) 1 Wils. 139; *Gibbons v. Village of Phoenix* (Sup.) 15 N. Y. Supp. 410; *Hopkins v. Ogden City*, 5 Utah, 390, 16 Pac. 596. The city engineer of the defendant corporation testified as follows: "I saw the sidewalk where the plaintiff fell, when being constructed. I considered the slope too great for safety, and know it has remained in the same condition as when constructed." The

defendant offered no testimony in the case. We consider that the defendant corporation was guilty of gross negligence. The validity of a verdict by nine jurors has already been sustained by the court, and we adhere to our former ruling. There is absolutely no merit in this appeal. The judgment is affirmed.

MINER, SMITH, and BARTCH, JJ., concur.

HEMBLING v. CITY OF GRAND RAPIDS.

(58 N. W. 310, 99 Mich. 292.)

Supreme Court of Michigan. March 20, 1894.

Error to superior court of Grand Rapids; Edwin A. Burlingame, Judge.

Action by Ella R. Hembling against the city of Grand Rapids. Judgment for plaintiff, and defendant brings error. Reversed.

Wm. Wisner Taylor, for appellant. Francis A. Stace, (McGarry, McKnight & Judkins, of counsel,) for appellee.

McGRATH, C. J. Plaintiff seeks to recover for injuries resulting from a fall upon an alleged defective sidewalk. The testimony tended to show that some of the stringers were decayed, but the planking was in a good state of preservation. The planks were 2 inches in thickness, and some 12 or 14 feet in length. They extended several inches beyond the curb. There was evidence tending to show that just before the injury a horse had been tied to one of these planks, and that just as the plaintiff came along the horse jerked one of these planks out of place, and that plaintiff stepped into the aperture, and fell. The court instructed the jury as follows: "Municipal liability for injuries arising from defects in public ways is the same, so far as concerns innocent persons, whether the condition of the way is due to wear and decay or to the misconduct of individuals in tearing it up; the obligation to repair speedily is the same." This instruction was erroneous. If the plank was displaced, that displacement was immediately before the accident. There was no showing made of actual notice to the municipality, and no pretense that a reasonable time to repair had elapsed; much less had sufficient time elapsed to operate as constructive notice. In any event, the use of the word "speedily" was improper, and was calculated to mislead the jury.

The court further instructed the jury, that "the defect may exist and be unknown, and the city still be liable, on the ground that the prime fault may consist in being ignorant; it being the clear principle that a want of knowledge may, under certain circumstances, imply a want of due care. The general duty of the city is to exercise, through its officers, a reasonable supervision over its streets and sidewalks, and, within fairly practicable limits, to be watchful of their condition and trustworthiness, and to see that they are kept in a reasonably safe condition for public travel. Its officers cannot ignore the dictates of common sense and lessons of ordinary experience, and refuse to see and refuse to heed what others see and what others understand. Such means should be employed by the officers from time to time in making their examinations as usually disclose the effects to be expected." This instruction was erroneous in that it assumed

that it was the duty of the municipality to make such an inspection of sidewalks as would disclose latent defects, if they existed. Respecting the ordinary sidewalks, there is no such duty of substructure inspection as is imposed in case of bridges or other elevated ways. In the absence of actual notice, municipalities are only liable for such defects in sidewalks as are apparent, or are suggested by appearances, or which are disclosed by a test in the nature of the ordinary use of such walks.

The court further instructed the jury as follows: "If, from a fair preponderance of evidence in this case, you believe that, up to and near the time of this injury, the sidewalk where it occurred was in a reasonably safe condition for the purposes for which it was laid, and that, on account of the sudden removal of a plank in such reasonably safe sidewalk, the plaintiff received injury, no matter whether the plank was so removed by a horse or individual, in such case the city would not be liable; but if for such length of time that the city had actual or constructive notice, and time sufficient to repair it, the sidewalk where the injury occurred had not been in a reasonably safe condition, and that, on account of such unsafe condition, and neglect to repair or make it reasonably safe for travel, the plaintiff was injured, then and in that case the city would be liable, if the plaintiff at the time was exercising reasonable care and prudence in passing along said sidewalk. If you find that the injury to the plaintiff occurred on account of the displacement of a plank by a horse fastened to it, this might not of itself excuse the city from liability, but it is left for you, under all circumstances, to determine whether or not the sidewalk was reasonably safe for public travel. And if you find it was not so reasonably safe, and that the city had timely notice of its unsafe condition, and that the plaintiff, while in the exercise of reasonable care on her part, was injured, and that unsafe condition of the walk was the approximate cause of her injury, then it matters not in what manner the plank was actually displaced." The municipality was in no sense responsible for the hitching of the horse to the plank in the walk, nor was the city bound to anticipate such use; and if, while plaintiff was advancing upon this walk, a horse hitched to one of the planks suddenly jerked the plank from its place, and plaintiff stepped into the aperture made thereby, and fell, receiving the injuries complained of, the defect in the walk cannot be said to have been the primary cause of the injury, and plaintiff was not entitled to recover. If this plank had been displaced by some other pedestrian in the use of the walk, or if this displacement had not been accounted for, and the condition of the walk had been shown to be such that such disarrangement was liable to occur in the ordinary use of the walk, a dif-

ferent case would have been presented. It certainly cannot be contended that, if parties had been engaged in tearing up this walk, the city would have been liable; yet the force employed was directly in that line. The judgment is therefore reversed, and a new trial granted.

LONG, GRANT, and HOOKER, JJ., concurred with McGRATH, C. J.

MONTGOMERY, J. I concur in the result reached by the chief justice, but I do not think the second instruction open to just criticism.

HUNT v. CITY OF DUBUQUE.

(65 N. W. 319.)

Supreme Court of Iowa. Dec. 12, 1895.

Appeal from district court, Dubuque county; Fred O'Donnell, Judge.

Action at law to recover for personal injuries alleged to have been caused by negligence on the part of the defendant. There was a trial by jury, and a verdict and judgment for the plaintiff. The defendant appeals.

J. E. Knight and W. J. Knight, for appellant. Logueville & McCarthy, for appellee.

ROBINSON, J. On the 11th day of April, 1893, the plaintiff, while walking on a sidewalk in a street of the defendant, fell, and received the injuries of which he complains. He alleges that his fall was caused by defects in the walk, of which the defendant had notice, and that it was negligent in not repairing it and making it safe for travel. The defendant denies negligence and liability on its part. The jury returned a verdict in favor of the plaintiff for \$4,000. A motion for a new trial having been filed, the court ordered that it be sustained, unless the plaintiff should take judgment for \$3,200. He elected to take judgment for that amount, and it was so rendered.

1. The appellant complains of the ruling of the court in permitting a witness, named Chewning, to state the condition of the walk at the time of the trial. The court had ruled that the condition of the walk after the accident occurred was immaterial, excepting as it was shown to be the same then as it was at the time of the accident. The witness named described the condition of the walk as he found it an hour or two after the accident, and was then asked: "The place where Hunt fell, has that been changed?" An objection was overruled, and the witness answered: "Yes, sir; I think there is a new board put in there." He was then asked: "Well, how is the sidewalk as to being in the same condition now that it was at the time you examined it? Is it or is it not?" An objection to this question was also overruled, and the witness answered: "It is in a better condition than it was then." It will be noticed that neither question called for any answer but "Yes" or "No," and what was said more than that was not called for by the question, and was not in any manner attacked. So far as the answers were required by the questions, they stated a fact which was not in dispute. Several witnesses testified without objections—one of them for the defendant and at its instance—that the walk was repaired within a short time after the accident occurred. Hence the defendant could not have been prejudiced by the rulings to which it objects.

2. The appellant complains of testimony given by Mrs. Dickenson in regard to the condition of the walk both before and after the accident. She lived in the house next to the sidewalk in question more than three years, and was familiar with its condition during that time. She moved from the house about six months before the accident occurred, but noticed its condition after she moved, and at about the time of the accident. She described the condition of the walk the year before the accident, and stated, in effect, that its condition was substantially unchanged at about the time of the accident. This was competent evidence to show the actual condition of the walk, and that it had been in a defective and dangerous condition for such a length of time that the defendant should be charged with knowledge of the defect before the accident occurred. The witness was also permitted to state that she had seen people stumble at the defective part of the walk, and that she saw an old gentleman stop and push the board down with his cane. The testimony tended to show the condition of the walk, and was material for that purpose, when taken with other evidence, to show that the condition continued until the accident occurred. *Smith v. Des Moines*, 84 Iowa, 688; 51 N. W. 77; *District of Columbia v. Armes*, 107 U. S. 519, 2 Sup. Ct. 840; *Bloomington v. Legg* (Ill. Sup.) 37 N. E. 696; *Grundy v. City of Janesville* (Wis.) 54 N. W. 1086; *Alberts v. Village of Vernon* (Mich.) 55 N. W. 1023. We do not find any reversible error on rulings on the admission of evidence.

3. The petition alleges that the defendant "had notice of the defective and dangerous condition of the sidewalk at and before the happening of the accident," and "that, notwithstanding such notice, the city negligently allowed the same to be out of proper repair, and made no effort to make the same safe for travel." The charge to the jury, in effect, instructed them that if the plaintiff, without fault on his part, had sustained damage by reason of the defective condition of the walk, he could recover if the defective condition "had existed for such a length of time before the alleged accident as that the defendant, through its officers, should have known of such condition"; also, that "the plaintiff is not required to prove actual notice to the city of such defect. If the sidewalk became out of repair to such an extent as to render it unsafe for travel, and was permitted to remain in such condition for such length of time, and was so open and apparent and visible to the passers-by, as to be notorious, it may be presumed by the jury that, from such notoriety, the proper officer of the city did in fact know of it, or with proper diligence might have known of this defective condition, in time to have repaired it before the accident complained of." The appellant complains of these and other portions of the charge

which authorized the jury to find against the defendant, even though it had no actual notice of the defective condition of the walk, on the ground that the petition only charges actual notice, and that there can be no recovery unless that is shown. We do not think this claim can be sustained. The petition charges notice without stating whether it was actual or constructive, and proof of either would sustain the averment. It is well settled that the notice need not be actual. *Montgomery v. City of Des Moines*, 55 Iowa, 101, 7 N. W. 421; *Rice v. Same*, 40 Iowa, 638.

4. The evidence tends to show that the plaintiff has sustained serious and permanent injuries, but there is much conflict in the evidence in regard to their cause and extent. It appears that, about fifteen years before the accident in question, he was injured by the explosion of the boiler of an engine, and it is insisted that his present condition is caused chiefly, if not wholly, by the injuries he then received, and that the amount of recovery is excessive. The nature and extent of the injuries of which the

plaintiff complains, and their cause, were matters for the jury to determine. The evidence authorized them to find that, at the time of the accident, he had almost wholly recovered from the effects of the explosion; that excepting an injury to one hand, which did not seem to affect his capacity to labor in his business, which is that of a stationary engineer, he had been sound, and, excepting for short periods of time, well, for 10 years; that the injuries of which he complains were caused by the accident in question; and that they have caused much loss of time and great suffering; and that they have permanently impaired his ability to work. Hence we cannot say that the amount which he has recovered is excessive.

5. Other questions have been discussed by counsel. Some are not of sufficient importance to require specific mention, and others are immaterial in view of the conclusions we have announced. There does not appear to be any sufficient ground for disturbing the judgment of the district court, and it is affirmed.

WEST v. CITY OF EAU CLAIRE.

(61 N. W. 313, 89 Wis. 31.)

Supreme Court of Wisconsin. Dec. 11, 1894.

Appeal from circuit court, Eau Claire county; W. F. Bailey, Judge.

Action by Louisa West against the city of Eau Claire for personal injuries. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Geo. C. Teall, for appellant. T. F. Frawley and A. C. Larson, for respondent.

NEWMAN, J.¹ * * * * *

The evidence on the part of the plaintiff tended to prove that at the place of the accident was a ridge of snow and ice along the track of the travel on the sidewalk, caused by the travel over the snow, which had been allowed to remain and accumulate there; that such ridge was uneven and slippery; that beside and near the ridge was a hole in the plank of the sidewalk; that at the time of the accident the plaintiff's attention was momentarily diverted; that she slipped, her foot went through the hole, and was held there until she fell in such a way as to break her ankle; and that this hole had been there from the previous summer. The evidence tended to establish all the facts necessary to entitle the plaintiff to recover. It was the undoubted province of the jury to determine whether it did establish such facts. This court has held repeatedly, and recently in *Koch v. City of Ashland* (decided at the last assignment, and not yet officially reported) 60 N. W. 990, that such an accumulation of snow and ice upon a sidewalk may constitute a defect for which the city may be liable, while such a hole in a sidewalk may unquestionably be such a defect. The momentary diversion of the plaintiff's attention could not be contributory negligence, as matter of law. The case was not so clear on either branch, upon the evidence, as to call upon the court to withdraw it from the jury. These were questions peculiarly within the province of the jury. It was not error to deny the motion for a nonsuit. The defendant offered no evidence. The case was submitted to the jury for a special verdict. The jury found specially that the hole in the sidewalk was a defect, and caused the accident; that the defect had existed for so long a time that the defendant should have known of and repaired it; and that no negligence on the part of the plaintiff contributed to pro-

duce the accident. It cannot be held that there was no evidence to support the verdict upon either point. On the contrary, it was fully sufficient on each point.

But the defendant claims errors in several instructions given by the court to the jury. As to the question, in what did the defect consist? the court instructed as follows: "Now, if you consider the snow was allowed to accumulate and did accumulate there, if you consider that was a defect, of course you will say so; if the evidence satisfies by a preponderance of such evidence that there was a hole in the sidewalk, of that character, size, and condition, which rendered the sidewalk unsafe for travel, why then you will state, of course, it was the hole in the sidewalk, if the evidence should satisfy you that the hole was there at the time." This seems to be unobjectionable. Either the ridge or the hole might be so serious a defect as to sustain plaintiff's action. Both together, or the hole alone, might be sufficient cause to produce plaintiff's accident.

The court also instructed: "If you find that she would not have fallen, while carefully walking upon this ice, unless her feet had gone into some hole or defect in the sidewalk, then you will answer that it was caused by her slipping on the ice, primarily, and a foot slipping upon the ice into a depression in the sidewalk, if the evidence so satisfies you." And so the jury found. The objection made to this instruction, and to the verdict upon this question, is that there is no direct or positive evidence that the plaintiff's foot went into a hole in the sidewalk at all. No one saw her foot in such a place, and plaintiff could not testify positively just how her ankle came to be broken. The hole was there; the foot was, somehow, held; the ankle was broken. It would be a legitimate inference, and not "mere conjecture," for the jury to find that the foot went into the hole, and was held there, and that that was the manner of the accident.

The defect which the jury found to be the cause of the accident had been in the sidewalk since the previous summer. It was not error for the court to instruct the jury that that was sufficient time in which the city should have learned of and repaired the defect.

The evidence is sufficient to support the verdict. The instructions contain no error, at least no important error. There was no error in denying the defendant's motion to set aside the verdict. The judgment of the circuit court is affirmed.

¹ Part of the opinion is omitted.

CITY OF WABASHA v. SOUTHWORTH.

(55 N. W. 818, 54 Minn. 79.)

Supreme Court of Minnesota. June 29, 1893.

Appeal from district court, Wabasha county; Start, Judge.

Action by the city of Wabasha against Asahel D. Southworth to recover the amount plaintiff was required to pay one Schinzel for injuries sustained by a defective sidewalk along defendant's premises. Plaintiff had judgment, and defendant appeals. Affirmed.

J. F. McGovern and Gould & Snow, for appellant. John W. Steele and Lloyd W. Bowers, for respondent.

MITCHELL, J. If the findings of fact were justified by the evidence, there is nothing new or doubtful in the law governing this case. In order to entitle the plaintiff to recourse on the defendant for the money which it had paid in settlement of the claim of Schinzel for injuries sustained by reason of the defective sidewalk, it was necessary to establish—First, that the city was liable to Schinzel by reason of negligence in the performance of its duty to the public to keep its streets in safe condition; and, second, that defendant was also liable to Schinzel by reason of his negligence in constructing or maintaining the nuisance in the street which caused the injury. If these two facts were established, then the right of the city to recourse against the defendant is not, and could not successfully be, denied.

There is nothing in the point that the mode of procedure prescribed by the city charter (Sp. Laws 1889, c. 13, subc. 7, § 16) is exclusive, and that the city's only remedy was to let the claim of Schinzel go to judgment against both it and Southworth, pay the judgment, and then enforce it against Southworth. This, like similar provisions in other charters, is designed to aid and not to hinder cities in dealing with such claims, so that the liability of a third party may be determined and enforced in the same action in which that of the city is determined and enforced. The only effect of the city's settling the claim without such judgment was that the questions upon which the liability of Southworth depends were left open. See *Jones v. City of Minneapolis*, 31 Minn. 230, 17 N. W. Rep. 377; *Clark v. City of Austin*, 38 Minn. 487, 38 N. W. Rep. 615; *Mill Co. v. Wheeler*, 31 Minn. 121, 16 N. W. Rep. 698.

The court found that the city might, by the exercise of ordinary care, have known of the unsafe condition of this sidewalk in time to repair it before the accident occurred. This finding, which is not assailed, settles the question of the city's liability to Schinzel.

Passing over the finding to the effect that this hatchway in the sidewalk was originally constructed in a negligent and unsafe manner, (which we think was justified by the evidence,) the court further found that the defendant knew, or by the exercise of or-

dinary care might have known, of the existence and character of this hatchway and covering at the time he purchased the property; also, that for more than a year prior to the accident he had negligently suffered and permitted this covering or trapdoor over the hatchway to become decayed and unsecurely fastened and supported, whereby the sidewalk over the excavation underneath became and was unsafe for ordinary travel. That the first part of this finding was supported by the evidence is beyond question. Indeed, we think the evidence was such as to require a finding that defendant had actual knowledge of the existence and character of this hatchway as long ago as the date of his purchase of the undivided half of the abutting property in 1873. Nor in our opinion is there any more room for doubt as to the sufficiency of the evidence to justify the latter part of the finding. The defendant maintained this hatchway in the street by allowing it to remain there, with knowledge of its existence. The fact that he had not used it for some years is immaterial, and the claim that he had relieved himself from responsibility by abandoning it is without merit. Having been constructed in the street for the convenience of his abutting property the only way he could relieve himself from the duty of keeping it in repair was to restore the street to its original condition by filling up the excavation and replacing the stringers under the sidewalk. *Nichols v. City of Minneapolis*, 33 Minn. 430, 23 N. W. Rep. 368.

The negligence of the defendant in the maintenance of this hatchway or cellar way we place upon his lack of ordinary care in not taking reasonable precautions to keep it in safe condition, and not upon the ground that all excavations, basement or cellar ways, scuttles, and the like, made or constructed in the street without affirmative municipal license, are per se unlawful, and nuisances. Numerous reported cases, both in this country and England, show that it has been assumed, time out of mind, in accordance with a custom of long standing, that, even in the absence of any express license, this is a legitimate use of the street for the convenience of abutting property, provided it be exercised in a proper and safe manner, and consequently that the property owner is not an absolute insurer against all injuries resulting from the existence of such things in the street, but is only responsible for negligence or want of reasonable care in their construction or maintenance. This we deem the correct view of the law on this subject. See *Fisher v. Thirkell*, 21 Mich. 1.

But such structures having been placed in the street for the convenience of the abutting property, it stands to reason that, as between the property owner and the city, the duty of maintaining them in a safe condition devolves on the former. Defendant was bound, in the exercise of ordinary care, to take notice of the fact that wood will decay. Lan-

dru v. Lund, 3S Minn. 53S, 3S N. W. Rep. 699. The fact that the planks forming the cover of this hatchway showed no signs of decay on the upper side did not justify the defendant in assuming, without inspection, that they and the stringers on which they rested had not, in the 18 years or more that they had been there, become rotten underneath, where they were excluded from the sun and subjected to constant moisture. Leaving these planks, which were a part of a public sidewalk, over an excavation five or six feet deep, with the middle stringers of the sidewalk cut away, the only support of the planks being at the two ends, the support at the inner end next the building being only about an inch in width of a perishable wooden stringer, and failing to inspect them for all these years, to ascertain their condition, constituted a state of facts that abundantly justified the court in finding that defendant was guilty of negligence. The defendant, however, sought to escape liability by attempting to show that he had rented the premises to certain tenants, and that they, and not he, were responsible for the maintenance of this hatchway and cover; and the refusal of the court to make a finding as to

the possession and occupancy of the premises by these tenants before and at the time of the accident is assigned as error. Without considering the points that the pleadings raised no such issue, and that according to the findings of the court this cover to the hatchway was already in an unsafe condition before the date of the lease to the tenants, it is enough to say that there was not a particle of evidence that the lease included the cellar or the hatchway.

There is no merit in defendant's seventh assignment of error. Of course, the city was not liable to Schinzel for his attorneys' fees as such, but the \$150 in this case was paid to his attorneys as part of the amount which the city had agreed with him to pay in settlement of his claim against it for damages. In legal effect, it was paid to Schinzel, and as long as it was paid for his benefit, and in settlement of his claim against the city, it was wholly immaterial to whom the money was actually paid over; the aggregate amount paid out in all being within the amount for which the city and the defendant were liable to him. As we do not discover any error in the record, the judgment appealed from must be affirmed.

LAMBERT v. PEMBROKE.

(23 Atl. 81, 66 N. H. 280.)

Supreme Court of New Hampshire. Merrimack.
July 25, 1890.

Exceptions from Merrimack county; before Justice Allen.

Case for injuries on a highway. At the close of plaintiff's evidence defendant moved for a nonsuit, and the motion was granted. Plaintiff excepts.

Burnham, Brown & Warren, for plaintiff.
Chase & Streeter, for defendant.

BLODGETT, J. Sidewalks, when a part of the public highways, must be properly constructed and guarded, and kept in suitable repair, (Hall v. Manchester, 40 N. H. 410, 414;) and, there being no provision in the statute as to damages which limits the liability of towns and cities to open defects, it extends to all defects which render them unsuitable for the travel thereon, (Gen. Laws, c. 75, § 1; Burt v. Boston, 122 Mass. 226.) Among such defects are those resulting from natural decay or faulty construction. Howe v. Plainfield, 41 N. H. 135, 138; Bardwell v. Jamaica, 15 Vt. 438, 442; Alexander v. Mt. Sterling, 71 Ill. 366, 369; Rapho v. Moore, 68 Pa. St. 404. And it is no defense that the highway was built by the abutter; for, when a town permits a third person to construct a highway, it is liable for its defects the same as if it had been built by the town itself. Willey v. Portsmouth, 35 N. H. 303, 313; Saulsbury v. Ithaca, 94 N. Y. 27. But when the immediate cause of the injury to the plaintiff is such that the town could not have had notice of it, or could not, in the exercise of reasonable care, have prevented or remedied it before the accident, the town is not liable. Palmer v. Portsmouth, 43 N. H. 265; Chamberlain v. Enfield, Id. 363; Clark v. Barrington, 41 N. H. 44; Hubbard v. Concord, 35 N. H. 52; Howe v. Plainfield, supra; Johnson v. Haverhill, Id. 74. The immediate cause of the injury to this plaintiff was the sinking

of the sidewalk under her feet, which resulted from the breaking of the wooden planks in the cellar wall of the adjacent building, either from natural decay or from native weakness, whereby the earth in front of them fell into the cellar, and thus left the brick part of the walk without support beneath, although up to the moment of the injury it was even throughout, and apparently firm upon the surface. With these conditions existing at the time of the injury, the sidewalk must be regarded as defective, within the meaning of the statute making towns liable for defects in highways; and the remaining question is whether there was any competent evidence tending to show the want of reasonable care on the part of the defendant in not preventing or remedying the defect before the accident. Ordinarily, the question of reasonable care is a question of fact for the jury, and especially in cases for damages received upon a highway; and no reason is perceived why it should not have been so treated in this case, inasmuch as the defect was not one of which the defendant could not have had notice, and there having been upon the question of their cause competent evidence tending to show that the planks were originally unsuitable and unsafe for the use to which they were put, or might have reasonably been expected to shortly become so through natural causes. As matter of law, it cannot properly be determined upon this evidence whether the defendants are or are not chargeable with the want of reasonable care. It is for the jury alone to decide whether, taking into account the cause of the defect, and all the attending circumstances, the fair inference from the evidence is that the defect is one which the town might and should, in the exercise of reasonable care, have prevented or remedied before the accident; and we are therefore of opinion that this question should have been submitted to them, and the motion for a nonsuit denied. Exceptions sustained.

ALLEN, J., did not sit. The others concurred.

OWEN v. CITY OF FT. DODGE.
(67 N. W. 281.)

Supreme Court of Iowa. May 16, 1896.

Appeal from district court, Webster county; S. M. Weaver, Judge.

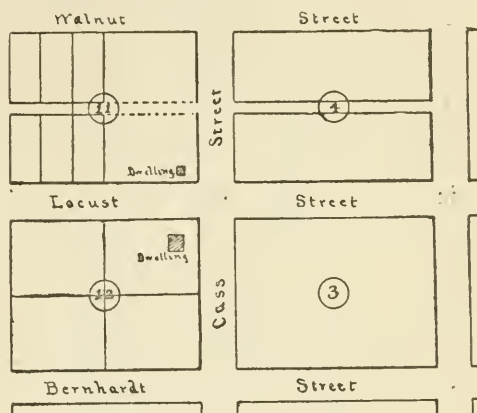
Action at law to recover damages for personal injuries received by plaintiff by reason of a defective sidewalk or crossing in the defendant city. There was a trial to a jury, verdict and judgment for plaintiff, and defendant appeals. Affirmed.

Blake & Mitchell and Botsford, Healy & Healy, for appellant. Yeoman & Kenyon, for appellee.

DEEMER, J. On the evening of the 14th day of October, 1892, the plaintiff, while attempting to pass over a plank street crossing in the defendant city, stepped between the boards there laid, and received the injuries of which she complains. She alleged that the crossing on which she was injured was at the corner of Cass and Locust streets, being the southeast corner of block 11 in Morrison and Duncombe's addition to the city, at the southwest corner of Cass at its intersection with Locust street, and on the north side of Locust street; that the crossing, as originally constructed, was defective, in that an open space of about one foot was left between the planks, which were laid lengthwise across a ditch or gutter in the street; and that the crossing had remained in this defective condition, with the knowledge and consent of the city authorities, for more than four months prior to the accident. She also averred that she was free from negligence contributing to her injury, and she asked judgment for \$9,000. The defendant, for answer, denied all allegations of the petition, and further pleaded as an affirmative defense that the accident happened at the southwest corner of block 11, and on the north side of Locust street, and at the northwest corner of the intersection of Cass and Locust streets in the city of Ft. Dodge; and that no notice, such as required by section 1, c. 25, Acts 22d Gen. Assem., has been served upon the defendant. The case was tried to a jury, which returned a verdict for plaintiff in the sum of \$2,000, upon which judgment was rendered, and this appeal followed.

1. The first matter called in question by appellant's counsel relates to the sufficiency of the preliminary notice given by plaintiff. The statute referred to by defendant in its answer is as follows: "In all cases of personal injury resulting from defective streets or sidewalks, or from any cause originating in the neglect or failure of any municipal corporation or its officers to perform their duty in constructing or maintaining streets or sidewalks, no suit shall be brought against the corporation after six months from the time of the injury unless written notice specifying the place and circumstances of the injury shall have been served up-

on such municipal corporation within ninety days after the injury." This action was commenced more than six months after the injury, and plaintiff served a notice upon the defendant, in which she stated that she received her injuries "while walking along the sidewalk on the west side of Cass street and attempting to cross Locust at the southwest corner of Cass at its intersection with Locust." Now, it appears that Locust street runs east and west, and Cass north and south, through Morrison and Duncombe's addition to the defendant city; that blocks 4 and 11 are immediately north of Locust, and 12 and 3 south of it, and that blocks 3 and 4 are immediately east of Cass, and 11 and 12 are immediately west. The following plat will explain the situation:



The appellant contends first that the notice locates the place a block away from where the injury occurred, and also insists that plaintiff claims the spot to be at three different places, to wit, the southeast corner of block 11, northwest corner of Cass and Locust streets, and the southwest corner of Cass and Locust streets. With reference to the first contention, it appears from a plat attached to defendant's abstract that the southeast corner of block 11 is at the intersection of Cass and Walnut streets, but appellee has filed an amended abstract, from which it appears that this is an error, and that the corner is at the intersection of Cass and Locust. This amended abstract is not denied, and we accept the statements therein made and the plats attached as true. We also find, after a close examination of the record, that the plaintiff has not at any time contended or charged that the accident occurred at the northwest corner of Cass and Locust streets. The only question which remains, then, is, is the notice which says that the accident occurred "while plaintiff was passing along the sidewalk on the west side of Cass street, and as she attempted to cross Locust at the southwest corner of Cass street at its intersection with Locust," sufficient? It will be observed that the statement is not that the accident happened at the southwest corner of the intersection of

Cass and Locust streets, which would undoubtedly mean a point at the northeast corner of block 12, but the southwest corner of Cass street at its intersection with Locust, which might mean the northeast corner of block 12, but might also properly be used in referring to the southeast corner of block 11. It is well known, however, that it is very difficult, in our ordinary speaking, to locate a street corner by using the points of the compass. When one refers to the northwest corner of a certain street intersection, he is frequently understood as referring to the northwest corner of the block south and east of the crossing, but more often, of course, to the southeast corner of the block, north and west from the intersection. But when he speaks of the southeast corner of a certain street at its intersection with another, he may refer to the northeast corner of the block lying south and west from the crossing; although one would probably be justified in inferring that reference was made to the southeast corner of the block lying northwest from the street crossing. In this particular case, however, the notice further points out the place by saying "that there was a defect in the crossing at said point by the plank being placed so far apart, or from some other defect to this subscriber unknown, that she stepped through the said plank, or said plank gave way under her, in whole or in part, inflicting the injuries complained of." Now, it seems to be undisputed that the plaintiff was injured by stepping between planks which were originally laid about a foot apart over a ditch along the southeast corner of block 11, on Locust street, which was about 2½ feet deep. There was no evidence in the case to show that there was any other crossing over Locust street at or near this point, or that there was any other constructed as this one was with planks laid as before stated. The object of the notice is that the city authorities may investigate the question of the defendant's liability while the facts are fresh, and the evidence is attainable; and reasonable certainty as to the place and circumstances of the injury is all that is required. It is not intended that the claimant shall state the exact spot where the accident happened, and a mistake of a few feet ought not to defeat the action. In this case the mistake, if there was one, was or less than an hundred feet. The notice, as a whole, indicated that the place of the accident was at the intersection of Locust and Cass streets. It pointed out the side of the street upon which it was to be found, and specified the defect which existed in the crossing. The evidence shows that there is no plank crossing on the south side of Locust street, nor from the west side to the east side, nor at any of the four corners of Cass and Locust streets, except at the southeast corner of block 11. It seems to us that no one with that notice in his hand, looking for the place, and passing

along the west side of Cass street at or near its intersection with Locust, would have failed to see and known the place where the accident is said to have occurred. Where the notice conveys the necessary information to the proper officers, it is good, even though there are some inaccuracies in it. The defendant could not have been, and was not in fact, misled. The attention of the mayor of the city was called to the exact place of the accident within three days after it happened, and the particular defect was pointed out to him. The testimony relied upon to prove the mayor's knowledge of the place was objected to, but we think it was proper; not perhaps to supplement the notice, but to show that the city was not misled. Our conclusions find support in the following cases: *Fopper v. Town of Wheatland* (Wis.) 18 N. W. 514; *Wall v. Town of Highland* (Wis.) 39 N. W. 560; *Salladay v. Town of Dodgeville* (Wis.) 55 N. W. 696; *Laird v. Town of Otsego* (Wis.) 62 N. W. 1042; *Fassett v. Town of Roxbury*, 55 Vt. 552; *Brown v. Town of Southbury* (Conn.) 1 Atl. 819; *Chapman v. Inhabitants of Nobleboro*, 76 Me. 427; *Fortin v. Inhabitants of Easthampton* (Mass.) 8 N. E. 328. The lower court instructed the jury as a matter of law that the notice was sufficient. This is said to be error—First, because the notice was not sufficient; and, second, because the question was for the jury, and not for the court. We have already disposed of the first objection. As to the second, we may say that, while it may not always be true that the question is for the court, yet such is the general rule. And in this particular instance, the facts being undisputed, the question was properly determined by the court. *Rogers v. Inhabitants of Shirley*, 74 Me. 144; *Chapman v. Inhabitants of Nobleboro*, supra.

2. At the conclusion of plaintiff's evidence defendant moved to strike out the same, because it was not addressed to the place named in the preliminary notice. This motion was overruled, and defendant thereupon filed a motion for a continuance, based upon the ground that it had not investigated any place other than that named in the notice. This last motion was overruled, and exception taken, and the ruling is now assigned as error. We think it was correct. What is said in the first paragraph of this opinion is a sufficient answer to the argument of counsel on this branch of the case.

3. Certain of the instructions given by the court are complained of, and it is also argued that the court was in error in refusing certain of those asked by the defendant. These instructions relate almost wholly to the amount of care required of plaintiff in going onto and passing over the crossing. We cannot set them out in full. The court said, in substance, that plaintiff could not recover unless she established her freedom from contributory negligence; that she was not bound to keep her eyes constantly on the walk before

her, but might rely upon the city to exercise ordinary and reasonable care to keep the place in repair, but that it was her duty to remember that, notwithstanding the most efficient supervision, yet defects and obstructions will appear in and upon sidewalks, and that it was her duty to use ordinary care in passing over the walks; that she had the right to travel upon the street and over the crossing, and that her care or negligence depended upon her conduct at or near the time and place of her fall. The instructions asked by defendant were to the effect that plaintiff was, as a matter of law, bound to discover defects ascertainable by the senses, and was guilty of contributory negligence, because she might have seen or discovered the alleged defect, or might have taken another walk to reach her destination. We think, as applied to the facts in this case, the court correctly instructed the jury. The accident happened after dark, and there was nothing to show that plaintiff was familiar with the condition of the crossing, or with the dangers attending an attempt to cross it. She was not bound, at her peril, to discover the defect. Ordinary and reasonable care and prudence was all that was required of her, and unless she knew it was imprudent to pass over the walk she was not required to take another route. Whether she exercised reasonable care and prudence was a question for the jury. We have recently had occasion to re-examine the question here presented, and will content ourselves by citing the cases, where the whole matter is fully considered: *Mathews v. City of Cedar Rapids*, 80 Iowa, 460, 45 N. W. 894; *Lichtenberger v. Incorporated Town of Meri-*

den (Iowa) 58 N. W. 1058; *Barnes v. Town of Marcus* (Iowa) 65 N. W. 335.

4. Other instructions with reference to defendant's negligence were asked and refused. In so far as they embodied correct rules of law, they were given in substance by the court in its charge to the jury.

5. Witness Tabor was allowed to testify that he saw one of the defendant's city aldermen at the place of the alleged accident some months before plaintiff received her injury, and that he had some conversation with him in reference to the condition of the crossing. This testimony was for the purpose of showing actual notice to the city of the condition of the walk through a member of its city council. It is contended by appellant that this was error, for the reason that notice to such an officer is not notice to the city, because it is not shown that he had any duty to perform with reference to the sidewalk or crossings. We have heretofore had occasion to consider this question, and in the cases of *Carter v. Town of Monticello*, 68 Iowa, 179, 26 N. W. 129, and *Trapnell v. City of Red Oak Junction*, 76 Iowa, 744, 39 N. W. 884, we announced that notice to such an officer was binding upon the municipality. These cases are decisive of the question presented.

Some other points are discussed by counsel, but what we have said disposes of every question of any moment in the case. We have not considered the affidavits filed by the respective parties, for the reason that, should we find appellant's contention true, it would not change the result. There is no prejudicial error in the record, and the judgment is affirmed.

MULLEN v. CITY OF OWOSSO.

(58 N. W. 663, 100 Mich. 103.)

Supreme Court of Michigan. April 17, 1894.

Error to circuit court, Shiawassee county; William Newton, Judge.

Action by Mary E. Mullen against the city of Owosso for personal injuries.

From a judgment for defendant, plaintiff brings error. Affirmed.

George L. Keeler (John T. McCurdy, of counsel), for appellant. Odell Chapman, for appellee.

LONG, J. The plaintiff, a woman about 34 years of age, was riding with Mr. Pond in a private carriage drawn by one horse along a public street in the city of Owosso. Overtaking Mr. Sanders, who was driving in the same direction, Mr. Pond attempted to pass him. Sanders was driving at a rapid rate, and Mr. Pond, in attempting to pass, started his horse rapidly forward. The parties raced for a distance, when Mr. Pond ran over a pile of sand in the highway. His carriage was overturned, and plaintiff thrown out and injured. The proofs are clear that Mr. Pond knew that a building was being erected by the side of this street, and that a mortar box and other materials were out in the street, in front of it. He stated that on a former trial he testified that he knew the street was incumbered by such materials, and thought that somebody was liable to get hurt there. Yet, in view of this knowledge, he carelessly drove his horse at the rate of more than six miles an hour in the street, contrary to the ordinances of the city. The court directed the jury: "If you find from the evidence in this case that the plaintiff would not have been injured but for the neglect of the city to give proper warning, then the plaintiff would be entitled to recover, unless you find that Mr. Pond knew of the obstruction to a portion of this street, and heedlessly drove over the obstruction; then he would be guilty of gross negligence, and plaintiff could not recover." Again the court said: "If the plaintiff in this case voluntarily entered the private conveyance of Mr. Pond, and voluntarily trusted her person and safety, in that conveyance, to him, by voluntarily entering into the private conveyance of Mr. Pond, she adopted the conveyance, for the time being, as her own, and assumed the risk of the skill and care of the person guiding it. So, if you find that Mr. Pond was negligent, in driving fast, the plaintiff could not recover." The jury returned a verdict in favor of the defendant.

The only question presented by the brief of plaintiff's counsel is whether the negligence of Mr. Pond is imputable to the plaintiff. This question was settled in the affirmative in *Railroad Co. v. Miller*, 25 Mich. 274 (decided by this court in 1872), and has not since been departed from. Counsel claims that some doubt has been cast upon

this doctrine by some of the later decisions, and cites *Battishill v. Humphreys*, 64 Mich. 503, 31 N. W. 894. In that case a child three years of age was run over by an engine upon a railroad operated by defendant, as receiver. The question was raised whether the negligence of the parents in permitting the child to go upon the track was imputable to the child. Mr. Justice Morse held that such negligence was not imputable to the child. The other justices expressed no opinion upon that point. In *Shippy v. Village of Au Sable*, 85 Mich. 280, 48 N. W. 584, the question whether the negligence of the parents was imputable to a child three years of age was again presented; and, upon a full hearing, it was the unanimous opinion of the court that such negligence was not imputable to the child. Other cases of like character have been presented to this court, involving that question; and the rule is now established that, when the child brings the action for negligent injuries, the negligence of the parents cannot be imputed to it. But the present case presents quite a different question. Here a person of the age of discretion voluntarily enters a private conveyance of another, to ride, and by the carelessness of that person is injured. The rule laid down in the *Miller Case*, cited above, excludes a recovery. It has been too long settled to be now disturbed. In *Schindler v. Railway Co.*, 87 Mich. 410, 49 N. W. 670, the rule was recognized. It was there said of the *Miller Case*: "This is the general rule, and has since been followed in this state." The rule was also recognized by this court in *Cowan v. Railway Co.*, 84 Mich. 583, 48 N. W. 166. Judgment is affirmed.

GRANT and MONTGOMERY, JJ., concurred with LONG, J.

HOOVER, J. (dissenting). The plaintiff was riding in a carriage, with, and upon the invitation of, a Mr. Pond, in the city of Owosso. In attempting to pass another vehicle, the carriage was overturned, by reason of its being driven upon a pile of sand or rubbish in the street, and plaintiff was injured. The defense is made that the driver, Mr. Pond, was negligent, and that such negligence should be imputed to the plaintiff. The cases are not harmonious upon this question, but the great weight of authority is against the defendant's contention; the case of *Thorogood v. Bryan* (decided in 1849) 8 C. B. 115, which is considered the leading case sustaining the defendant's proposition, having been overruled in England, and repudiated in this country, generally, though followed in some states. That was a case of the collision of two omnibuses. The action against the owner of one by a passenger of the other was defeated upon the ground of contributory negligence, upon the theory that the passenger was so identified with the driver of his vehicle as to be chargeable with his neg-

ligence. This decision seems to rest upon an inference that the driver is the agent of the passenger, or at least that he is under the direction and control of the passenger. The case was disregarded in *Rigby v. Hewitt*, 5 Exch. 239, and distinctly overruled in *The Bernina*, 12 Prob. Div. 58; *Mills v. Armstrong*, 13 App. Cas. 1. In the last case, Lord Herschell commented as follows upon the case of *Thorogood v. Bryan*: "In short, as far as I can see, the identification appears to be effective only to the extent of enabling another person, whose servants have been guilty of negligence, to defend himself by the allegation of contributory negligence on the part of the person injured. But the very question that had to be determined was whether the contributory negligence of the driver of the vehicle was a defense, as against the passenger, when suing another wrongdoer. To say that it is a defense, because the passenger is identified with the driver appears to me to beg the question, when it is not suggested that this identification results from any recognized principles of law, or has any other effect than to furnish that defense, the validity of which was the very point in issue." In *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. 391, Mr. Justice Field uses the following language: "The truth is, the decision of *Thorogood v. Bryan*, rests upon indefensible grounds. The identification of the passenger with the negligent driver or the owner, without his co-operation or encouragement, is a gratuitous assumption. There is no such identity. The parties are not in the same position. The owner of a public conveyance is a carrier, and the driver, or the person managing it, is his servant. Neither of them is the servant of the passenger, and his asserted identity with them is contradicted by the daily experience of the world." The doctrine of *Thorogood v. Bryan* has met with similar treatment in most of the state courts of last resort, and, as to public conveyances, may be said not to state the law correctly. The reasons upon which these cases rest are equally conclusive in cases where the injured party was riding in a hired carriage with a driver from a livery stable; in cases where the passenger does not, as a matter of fact, exercise such control over the driver as to make him his servant. See *Little v. Hackett*, supra. *Missouri Pac. Ry. Co. v. Texas Pac. Ry. Co.*, 41 Fed. 316; *Larkin v. Railway Co. (Iowa)* 52 N. W. 480; *Railroad Co. v. Steibrenner*, 47 N. J. Law, 161; *Randolph v. O'Riorden (Mass.)* 29 N. E. 583. In cases like the present the question becomes one of fact; the test of the passenger's responsibility for the negligence of the driver depending upon the passenger's control, or right of control, of the driver, so as to constitute the relation of master and servant between them. *Railway Co. v. Kutac*, 72 Tex. 643, 11 S. W. 127; *Cahill v. Railway Co. (Ky.)* 18 S. W. 2; *Nesbit v. Town of Garner*, 75 Iowa, 314, 39 N.

W. 516; *Dean v. Railroad Co.*, 129 Pa. St. 514, 18 Atl. 718; *McCaffrey v. President, etc. (Sup.)* 16 N. Y. Supp. 495; *Masterson v. Railroad Co.*, 84 N. Y. 247; *Noyes v. Boscawen*, 64 N. H. 361, 10 Atl. 690; *Follman v. City of Mankato*, 35 Minn. 522, 29 N. W. 317; *Railroad Co. v. Hogeland*, 66 Md. 149, 7 Atl. 105; *State v. Boston & M. R. Co.*, 80 Me. 430, 15 Atl. 36; *Town of Knightstown v. Musgrove*, 116 Ind. 121, 18 N. E. 452; *Railroad Co. v. Spilker (Ind. Sup.)* 33 N. E. 280. It should not be inferred that a passenger can shelter himself behind the fact that another is driving the vehicle in which he rides, and relieve himself from his own personal negligence. What degree of care should be required in the selection of a driver, or in observing and calling attention to dangers unnoticed by the driver, must depend upon the circumstances of each case.

It remains to inquire whether this question can be considered an open one in this state. The question before us is doubtless supposed by many to have been settled in the case of *Railroad v. Miller*, 25 Mich. 274, and it cannot be denied that the syllabus of that case would confirm the opinion. The facts in that case were these: The plaintiff, a woman, was riding with Eldridge, being in his employ. The wagon was struck upon a railway crossing, near which was a wood pile belonging to the defendant, which obscured the view of the railroad. The only allusion to the question here discussed arose as follows: The court said: "So that the only negligence which can be claimed in the mode of running the train must rest upon the ground that the company, having obscured the view and deadened the sound of the approaching train by the mode of piling their wood, were bound, for that reason, to run at much less than their usual rate of speed, in approaching that crossing, or to keep a flagman there, or use some other extra means to warn people traveling the highway of the approach of trains from the west. The materiality of this question must depend upon another,—whether the plaintiff's own negligence, or that of Eldridge, who was driving the team, contributed to the injury, within the meaning of the generally settled rule upon this subject; for, as she was riding with Eldridge, the owner and driver of the team, any negligence of Eldridge equally affects her rights in this suit, as was properly held by the court." It will be noticed that the subject is passed without discussion, and the court proceeds with a lengthy review of the doctrine of contributory and comparative negligence. On page 286 the court states the established facts, among which are the following: "Eldridge was slightly deaf, but the plaintiff herself was not." "They kept on, still upon the walk (the train in sight), not stopping to listen, and looking neither to the right nor the left, neither up nor down the track. They are almost upon it. He (the witness) still thinks they will stop, but they move

steadily on," etc. Again: "No logic can find in it, or extract from it [the evidence], the faintest manifestation of common prudence, which the circumstances demanded, in approaching the crossing." The court finds from the testimony of the plaintiff herself that neither Eldridge nor herself used any caution whatever. One of two things must be admitted, under the facts stated, viz. (1) that plaintiff was relieved from all responsibility by the fact that she was riding with Eldridge, and was under no obligation to look for the train; or (2) that the failure to do so was contributory negligence upon her part, which should have precluded a recovery by her, in which case the question of imputed negligence was unimportant. The opinion apparently takes the latter view, so far as plaintiff's own negligence is concerned, where it says, "I think the evidence tended affirmatively to prove actual and gross negligence on their part, which contributed directly to produce the injury complained of." From the finding, I think it may be said that the question before us was not necessarily involved in the Miller Case, and that it was not considered the controlling point. If it is to be treated as conclusive, against the overwhelming weight of authority in the United States and England, we shall apparently accept an incidental remark in an opinion as decisive upon an important principle, which deserved a full discussion before being settled. An examination will show that this decision has never since been applied, beyond a recognition of the doctrine in cases where it was not involved in the decision. It was mentioned and recognized in *Cuddy v. Horn* (Mich.) 10 N. W. 32, but the court

disposed of the case upon the ground that the passenger upon a yacht had not control of the management. In *Schindler v. Railway Co.*, 87 Mich. 411, 49 N. W. 670, the court again recognized the rule; saying that it was settled in *Railway Co. v. Miller*, but that it did not apply, because the defendant was guilty of wantonness. The plaintiff was a child riding with a neighbor. Mr. Justice Champlin, in a dissenting opinion, protested against the doctrine. 87 Mich. 419, 49 N. W. 670. In *Battishill v. Humphreys*, 64 Mich. 509, 31 N. W. 894, Mr. Justice Morse uses the following language: "I am not content to let the question pass as a settled one in this state. At least, I am not willing to assent to the proposition that the negligence of any other person can become the contributory negligence of a plaintiff, without his fault. 64 Mich. 508, 31 N. W. 894. In the case of *Shippy v. Village of Au Sable*, 85 Mich. 292, 48 N. W. 584, Mr. Justice Morse expressed satisfaction with his views in the *Battishill* Case, and added, "I am also satisfied that the great weight of authority in this country is opposed to the contention of the defendants." In neither of these cases was the doctrine of *Railway Co. v. Miller* applied. It seems, therefore, that the authority of the case of *Railway Co. v. Miller* has been repeatedly questioned. The time has arrived when the question must be settled. I think it should be in conformity to the weight of authority, and the better rule. The judgment should be reversed, and a new trial ordered.

McGRATH, C. J., concurred with HOOKER, J.

MALOY v. CITY OF ST. PAUL.

(56 N. W. 94, 54 Minn. 398.)

Supreme Court of Minnesota. Aug. 17, 1893.

Appeal from district court, Ramsey county; Cornish, Judge.

Action for personal injuries by Winnie Maloy against the city of St. Paul. Plaintiff had judgment, and, from an order granting a new trial, she appeals. Reversed.

Williams, Goodenow & Stanton, and D. Ed. Dwyer, for appellant. L. T. Chamberlain and H. W. Phillips, for respondent.

COLLINS, J. Plaintiff brought this action to recover for personal injuries caused by a defective sidewalk, and obtained a verdict, which was set aside, and a new trial ordered, on motion of defendant city. The facts were not in dispute. The defect was in the walk in front of the lot on which plaintiff resided with her husband, and close by their dwelling. The planks in the walk at this particular point had been laid lengthwise, and one had been broken down, so that there was a hole about 18 inches long and about 6 inches in width, at the widest place. The walk had been laid 6 inches above the surface of the ground. It had been in this defective condition for more than three months, and plaintiff had known of this all of the time. She had passed by this break or hole daily for more than two months prior to the evening of this accident, carefully avoiding the dangerous place. When the accident occurred, there was a light snow upon the walk, partly filling the hole, and the snow was still falling. About dark, plaintiff, who was 50 years of age, having occasion to go to a neighbor's, went out on the walk, and, stepping into the hole, was thrown down, thus receiving the injuries complained of. She testified that the falling snow was blown into her eyes so that her vision was obstructed, and also that she did not think of the defect as she walked along. It did not appear from the testimony that there was anything to distract

her attention, and, because there was nothing justifying or excusing inattention to the well-known condition of the walk, the court below ordered a new trial.

In accordance with the prevailing rule everywhere, it has again and again been held by this court that previous knowledge of the condition of a street or sidewalk is not conclusive evidence of contributory negligence, so as to bar a recovery by a person injured in consequence of its being out of repair; and the cases were collated very recently in *Wright v. City of St. Cloud*, (Minn.) 55 N. W. Rep. 820, in which a recovery was denied because it was apparent from plaintiff's own testimony that she had full and present knowledge of the exact condition of the walk, and the risk incident to traveling upon it, could easily have avoided it, and simply overestimated her own ability to go across, in broad daylight, without falling. On the facts the case at bar is not analogous. The defect here was not such as would or should have turned the prudent traveler off from the walk to seek a better route. The accident happened in the evening, when the snow was falling, blowing, and to some extent obscuring the vision of the plaintiff, and filling the hole in the walk. Although advised of the defect, she did not have it presently in mind. Nor is it necessary that the thoughts of a traveler should be at all times fixed upon defects in the street or sidewalk, of which he may have notice. *George v. Haverhill*, 110 Mass. 506; *Barton v. City of Springfield*, Id. 131. It is certain that previous knowledge of the existence of a defect has an important, and oftentimes a decisive, bearing upon the question of contributory negligence; but mere inattention to a known danger, on the part of this plaintiff, cannot be held to conclude her. Of the Minnesota cases before referred to, that of *Estelle v. Village of Lake Crystal*, 27 Minn. 243, 6 N. W. Rep. 775, is, on the facts, as they appeared in the record,—although not very fully stated in the opinion,—more in point than any other.

Order reversed.

GEURKINK et al. v. CITY OF PETALUMA
et al. (S. F. 250.)

(44 Pac. 570, 112 Cal. 306.)

Supreme Court of California. April 7, 1896.

Department 1. Appeal from superior court, Sonoma county; R. F. Crawford, Judge.

Action by B. W. Geurkink and another against the city of Petaluma and others. From a judgment for defendants, and an order denying a new trial, plaintiffs appeal. Reversed.

Lippitt & Lippitt, for appellants. J. P. Rogers (W. B. Haskell, of counsel), for respondents.

GAROUTTE, J. This is an action for a permanent injunction against the city of Petaluma, brought by two owners of lots abutting upon Eighth and G streets of that city, respectively. Relief was denied them in the trial court, and this appeal comes to us from the judgment, and also from an order denying a motion for a new trial.

The facts material to a consideration of this question may be succinctly stated as follows: Edwards creek has been from time immemorial a natural water channel passing over Eighth street, and thence across the city to tide water. Some few years past the city blocked the channel of this stream where it crossed Eighth street, and attempted to take care of its waters by a sewer leading from this point down F street. During heavy rains this sewer proved entirely inadequate to carry the waters coming from the mountains via the stream, and F street was flooded as the result, the natural fall of the land tending that way. The plaintiffs' property was situated a block or more distant and east from the point of obstruction; Geurkink's lot being upon Eighth street, and facing north, and the lot of his co-plaintiff facing east upon G street. The land covered by Eighth street between F and G streets was higher than at the point where the sewer connected with the stream, and, if any water ever did pass over Eighth street to G street prior to the time when the work of the city here complained of was inaugurated, the amount was slight; for, as we have seen, the lay of the land forced it north down F street. Under the conditions just stated the city of Petaluma, by its board of trustees, adopted a scheme to take care of the waters coming from this creek which could not be carried away by the aforesaid sewer. This scheme included the enlargement of a culvert at F and Eighth streets, the digging of a large gutter or channel upon the south side of Eighth street to G street, a culvert across Eighth street at this point, and a gutter channel down G street upon the west side thereof to Seventh street. The work mapped out by this scheme was in active operation when the plaintiffs began the present litigation, and a temporary restraining order was issued. These facts cannot

be disputed by the record, and neither can it be successfully disputed that from the evidence the completion of the scheme would result in great damage to plaintiff's property.

The facts being plainly outlined before us, the application of the law to these facts is not difficult, and at the outset of this investigation it must be borne in mind that the principles of law appertaining to waters in natural channels are different, to a considerable degree, from those applicable to the control of surface waters. That a city has much greater powers and less liabilities respecting surface waters than it has respecting highways of natural channels cannot be questioned. Reduced to its smallest compass, the fact is that the city of Petaluma is engaged in changing the natural course of the waters of Edwards creek, and such change, if made, will damage the property of these plaintiffs by preventing a free use of the same. Is defendant liable for such action upon its part, and is the proceeding of injunction by a court of equity the proper remedy? When this work has been completed, and the damage actually done, there can be no question but that a remedy at law for such damages could be invoked. Abutting owners have a right to the full use of the street for the purpose of coming and going to and from their property, and any unlawful interference with that use is a trespass upon the rights of such owners, whether that interference be occasioned by an individual, a corporation, or the municipality itself. It is said in *Eachus v. Railway Co.*, 103 Cal. 614, 37 Pac. 750: "The right of the owner of a city lot to the use of the street adjacent thereto is property, which cannot be taken from him for public use without compensation; and any act by which this right is impaired is to that extent a damage to his property. * * * Such easement is a right of property incident to the lot itself, and any damage sustained by the owner in its destruction or impairment is a damage peculiar to himself, and independent of any damage sustained by the public generally. For the purpose of determining this damage, it is immaterial whether he has a fee in the street, or only an easement for its use. In either case it is property, for an injury to which he is entitled to relief."—citing cases. See, also, *Bigelow v. Ballerino* (Cal.) 44 Pac. 307.

Respondent also insists that compensation to an abutting owner by the city for an interference in the use of the street need not be made before the damage has taken place. But article 1, section 14, of the constitution expressly provides that compensation must be first made or paid into court for the owner; and in the *Ballerino* Case, last cited, this court said: "But, where there is no such benefit, the property owner may rest secure in the protection which the constitution affords him, that his property shall not be taken or damaged without compensation first

made. It is not incumbent upon him to demand that the authorities shall respect his rights. The duty is theirs to work no unlawful invasion of them." And again: "It would matter little whether the authorities first compensated the property owners, and then declared the alley closed, or first declared it closed and then made compensation, provided it be distinctly understood that in the latter case, which is the case at bar, no rights attach or are lost, no invasion of the property rights of a nonconsenting owner may be worked, and no substantial impairment of his easement result, until compensation has been made to him in the constitutional mode."

It is also claimed that injunction is not the proper remedy, but, in view of what has already been said, that remedy fits the case. A threatened permanent injury to a party's realty may be enjoined, and such is this case, as disclosed by the record. In *Brown v. City of Seattle*, 5 Wash. 44, 31 Pac. 313, and 32 Pac. 214, it is held that injunction is the proper remedy in a like case; and the court, in speaking to that point, said: "We can foresee many difficulties, and perhaps much litigation, likely to ensue from the faithful enforcement of our constitutional requirement that damages be first paid; but we have no choice in the matter, and these difficulties, as well as many others, must be met and dealt with as they arise. It will not be every case in which the property own-

er deems himself likely to be injured that will justify an injunction, and the courts of the state will undoubtedly do their duty in this particular, and grant no preliminary restraining order or injunction until it is made to appear with legal probability or certainty that damages will be incurred by the grading of the streets." Until compensation was made the city had no right to damage the plaintiffs' property. Payment of such damage was a condition precedent to the creation of the right; and, until payment, the city was a trespasser. In such a case injunction is the plain, ordinary, and best remedy. See *Schaufele v. Doyle*, 86 Cal. 107, 24 Pac. 834.

A demurrer was filed to the complaint upon the ground of misjoinder of parties plaintiff, and misjoinder of causes of action. As the case is returned to the lower court for a new trial, it becomes proper to suggest that the demurrer should have been sustained. As to the relief sought by injunction, the plaintiffs were properly joined, but as to damages there was a misjoinder. If damages are sought for the acts of defendants, the plaintiffs must sue separately. *Foreman v. Boyle*, 88 Cal. 290, 26 Pac. 94. The judgment and order are reversed, and the cause remanded, with leave to the plaintiffs to amend their complaint as they may see fit.

We concur: HARRISON, J.; VAN FLEET, J.

CITY OF BEATRICE v. LEARY.

(63 N. W. 370, 45 Neb. 149.)

Supreme Court of Nebraska. May 21, 1895.

Error to district court, Gage county; Bush, Judge.

Action by Ellen Leary against the city of Beatrice. Judgment for plaintiff, and defendant brings error. Affirmed.

E. O. Kretsinger, for plaintiff in error. Geo. A. Murphy, for defendant in error.

RAGAN, C. The Big Blue river runs south through the city of Beatrice, crossing Court street at right angles. The property of Mrs. Ellen Leary, consisting of some city lots and a dwelling house thereon, is situated on the north side of Court street, and some distance west of where said street crosses said river. Cedar street opens into Court street immediately south of Mrs. Leary's property. One block south of Court street, and parallel thereto, is Mary street; and one block south of Mary street, and parallel thereto, is Scott street. The country to the south and west of Mrs. Leary's property inclines to the north and east to the river. In the summer of 1891, and prior thereto, a draw or swale heading in the foot hills of said river some miles southwest of where the river intersects Court street, meandered from the hills in a northeasterly direction, and entered Cedar street south of Scott street, thence along Cedar street into Court street, immediately south of the Leary property, and there opened into a ditch or gulley extending down Court street to the Blue river. It seems from the record that the ditch was an artificial channel that had been made to take the place of the draw which had once extended down Court street to the river. In the summer and autumn of 1891 the city of Beatrice graded and paved Court street west of the river, to a point west of the Leary property, and in doing so filled up the ditch in Court street through which the waters from the draw or swale above mentioned had been accustomed to find their way to the river. The draw was not a "running stream," as that term is commonly understood, although it would seem from the evidence that there was some water in some portions of it during most of the year. The draw was in fact a natural conduit, through which the surface waters resulting from rains and melting snows on a large area of country found their way to the Blue river. Mrs. Leary brought this suit to the district court of Gage county against the city of Beatrice. She alleged that in the spring of 1892 the waters came down in this swale or draw from the southwest along Cedar street to Court street, and, being unable to escape to the river, overflowed said street, and flowed on and damaged her property. The ground of negligence alleged by her against the city, and made the basis of her action, was that the

city, in grading and paving Court street, filled up said ditch, and failed to provide any outlet for the waters which were accustomed in times of rains or freshets to flow down in said swale or draw, and thence escape by said ditch into the river. The city, in addition to a general traverse of the material allegations of the petition as to its negligence, pleaded as a defense to the action that the grading and paving of Court street were done upon the petition and request of the abutting property owners of said street, Mrs. Leary being among the number of said petitioners; and that, by reason of her petitioning the city to grade and pave said street in the manner it did, she was estopped from claiming damages against the city resulting from said paving and grading. A further defense was that the damages sued for were the result of an unprecedented and violent rain storm and flood, of such a character as to be, in contemplation of law, the act of God. Mrs. Leary had a verdict and judgment, to reverse which the city has prosecuted to this court a petition in error.

1. The first contention of the city is that the damages awarded Mrs. Leary are excessive, and appear to have been given under the influence of passion or prejudice. This contention cannot be sustained. The damages awarded are less than the damages testified to; and therefore the amount of the damages raises no presumption that the jury was influenced by passion or prejudice in making the award.

2. The second contention is that the verdict is not sustained by sufficient evidence. Two arguments are made in support of this assignment:

(1) That the city, prior to its paving and grading Court street, adopted a plan or scheme for the draining of the waters which were accustomed to come down said draw and ditch into the river; and, to carry out this plan, the city constructed dams or dikes across the draw at Scott and Mary streets, and dug ditches along the sides of said streets from the draw to the river. The sufficiency of these dikes and ditches to accomplish the purposes for which they were constructed was passed upon by the jury, and we cannot say that they came to an incorrect conclusion.

(2) The principal argument, however, under this head, is that the finding of the jury that the damages sustained by Mrs. Leary were not the result of the act of God is wrong. The evidence on this subject was conflicting, and some of it as extraordinary as the freshet or rainstorm was alleged to be. A large number of witnesses testified on behalf of Mrs. Leary that they had lived in the vicinity of Beatrice for a number of years, and that the freshet or rain which injured her property, while it was a great rain, was no greater than other rains they had known there, or, in substance, that the

rain was not an unprecedented flood, a cloudburst, or waterspout. On the other hand, witness after witness in behalf of the city testified that it was the most violent flood they had ever known. The testimony of two of these witnesses and their names deserve a place in the piscatorial history of the state. One Frank Thompson testified that just prior to the rain he had crossed the draw in question on a pony, and immediately after crossing the draw it began to rain, and before he could recross the draw the water had risen in it so high that the pony was compelled to swim, and that the flood carried the pony and his rider over a wire fence; that, after he had succeeded in crossing the draw, he went down to the city, presumably on his pony; and that the flood carried him over more wire fences; that the draw where he was when the rain began was 12 feet deep and 40 feet wide, and it was filled with water to the top of its banks in one second. The other witness, Schultz, had a barn near Scott street and the draw. He testified that the water rose in the draw up to the top of the roof of the barn, and did so in five or six minutes. The record does not disclose whether the barn was washed away. It is asking too much of this court to disturb the verdict of a jury based on evidence like the above. We are not fitted by our profession or training for such a task. Only a jury of the vicinage could find the straight and narrow way of truth and dry land in such storms and floods and Cimmerian darkness as this. The district court told the jury that, if they believed from the evidence that the damage done to Mrs. Leary's property was the result of excessive, extraordinary, and unusual cloudbursts, rain storms, and floods, these would constitute under the law an act of God, for which the city was not liable, unless they found from the evidence that the negligence of the city contributed in a "large degree," "along with the act of God," to the damage of the plaintiff. This instruction was correct. *Railroad Co. v. Fink*, 18 Neb. 89, 24 N. W. 691. The evidence shows that Mrs. Leary's property was damaged by the freshet in the spring of 1892; that she sustained damages equal to the amount awarded by the jury; that her property was damaged by the waters that came down this draw to Court street, and by reason of the draw being there obstructed, and the ditch in the street having been filled, the waters were unable to escape to the river, and overflowed on her property; that this overflow was brought about by the act of the city in damming the draw and filling the ditch in Court street, and failing to provide sufficient outlets or ditches down Mary and Scott streets or elsewhere to vent these waters.

We therefore reach the conclusion that the finding of the jury that the negligence of the city was the proximate cause of the injury sustained by Mrs. Leary has sufficient evidence in the record for its support.

3. Another assignment is that the verdict is contrary to law. Three arguments are made to support this assignment.

It is first insisted that the city had the lawful right to pave and grade Court street; and that in doing so it had a right to defend itself and its property against surface water,—the common enemy,—by filling the ditch in said street, and diking or damming the draw that emptied into said ditch; and that it is not responsible for any damages that Mrs. Leary may have sustained resulting from its actions in that respect. The doctrine of this court is the rule of the common law that surface water is a common enemy, and that an owner may defend his premises against it by dike or embankment, and, if damages result to adjoining proprietors by reason of such defense, he is not liable therefor. But this rule is a general one, and subject to another common-law rule that a proprietor must so use his own property as not to unnecessarily and negligently injure his neighbor; and therefore every proprietor may lawfully improve his property by doing what is reasonably necessary for that purpose, and, unless guilty of some act of negligence in the manner of its execution, will not be answerable to an adjoining proprietor, although he may thereby cause the surface water to flow on the premises of the latter to his damage. But if, in the execution of such enterprise, he is guilty of negligence which is the natural and proximate cause of injury to his neighbor, he is accountable therefor. *Railroad Co. v. Sutherland* (Neb.) 62 N. W. 859, and cases there cited. The city had the right to grade and pave Court street. It had the undoubted right to fill the ditch therein, and to dike or dam the draw that emptied into said ditch. In other words, it had the right to take such steps and perform such acts as, in its judgment, were necessary to protect its street from surface waters; but, while it had this right, it was charged with the duty of exercising it with ordinary care. It knew, and was bound to know, that this draw was the natural conduit from which the surface waters from a large area of surrounding country were wont to find their way to the Blue river; and when it diked this draw at Court street, and filled up the ditch in said street, it was charged with the duty of constructing sufficient ditches and outlets to carry the surface waters coming down said draw to the river.

Another argument under this assignment is this: Some time in the spring of 1891, Mrs. Leary and other property owners along Court street petitioned the city of Beatrice to grade and pave said street. The argument is that, the city having complied with this petition, Mrs. Leary is now estopped from claiming damages resulting from such grading and paving. It must be remembered, however, that the basis of Mrs. Leary's action against the city is not that her property was damaged simply because the city graded and paved

Court street, but her cause of action is founded, and founded only, upon the alleged negligent omission of the city to provide suitable and sufficient outlets for the surface waters of the draw after the city had dammed it, and filled the ditch into which it emptied. To sustain his contention, counsel cite us to *Hembling v. City of Big Rapids* (Mich.) 50 N. W. 741, where it was held that "where plaintiff joined in a petition to the city council to grade and improve a street abutting his lots, paid his assessment for the improvement voluntarily, without objecting to the improvement or the assessment, he is afterwards estopped from claiming damages by reason of the improvement, damming the water course across the street, and causing the water to flow his lots." To the same effect are *City of Pontiac v. Carter*, 32 Mich. 164, and *Collins v. City of Grand Rapids* (Mich.) 54 N. W. 889. Whatever may be said of these decisions, they are of no force in this state, under our constitution, which expressly provides that private property shall neither be taken nor damaged for public use without just compensation. It may be that if the city, in grading and paving Court street, left Mrs. Leary's property either so far above or below grade as to damage it, she, having petitioned the city to bring the street to grade, would be thereby estopped from claiming damages. But that point is not before us, and we do not decide it. It would be going very far, indeed, to hold that, because Mrs. Leary petitioned the city council to grade and pave this street, she thereby waived her cause of action against the city for damages it might do to her property in performing the grading and paving in a negligent manner.

(3) The third argument is that the judgment is contrary to law, because the city adopted a plan for carrying the waters of this draw into the Blue river by building dikes, as already stated, across the draw at Scott and Mary streets, and constructing ditches along said streets from the draw to the river; that the city in adopting this plan was exercising legislative functions; and that the city is not liable for any damages that have resulted, although the plan adopted was defective, as it is not liable, in the absence of bad faith, for a mere error of judgment. The authorities on this question are in hopeless conflict. On the one hand, it is held that the adoption of a plan of drainage by a city is a judicial act on the part of its governing body, and that, therefore, the city is not responsible in damages if the plan adopted is insufficient or defective. On the other hand, it is held that the duty of a municipal corporation to provide drains and sewers is ministerial in its character and not judicial, and that municipal corporations are liable for the safety, sufficiency, and the skillful construction of its sewers and system of drainage. In *City of Indianapolis v. Huffer*, 30 Ind. 235, it was held that "an incorporated city is not ordi-

narily liable for consequential injuries to private property resulting from the grading and improvement of its streets, if, in making such improvements, reasonable skill and care be used to avoid the injuries. The skill and care which is incumbent relates as well to the plan as to the execution of the work; in the case of a sewer, to its capacity, as well as to the mechanism in its construction." We think this is the better rule. But, to sustain the judgment in this case, it is not necessary to decide whether negligence can be imputed to a city, and it made liable for damages resulting therefrom, because its council, acting in good faith, erred in the plan or scheme of drainage adopted by it. If the city of Beatrix, in adopting the plan it did adopt for conveying the surface waters from the draw in question to the Blue river, exercised legislative functions, if the plan adopted was defective and imperfect, and if the city is not liable because of the adoption of such defective plan, still the building of the dikes at Scott and Mary streets, the cutting of the ditches along those streets to the Blue river, were ministerial acts; and if the city, in building said dikes and in constructing said ditches, negligently omitted to construct them of sufficient capacity to carry off the waters that were accustomed to flow down said draw, and damages resulted to the plaintiff as the proximate result of such negligent omission, the city was liable. Whether the ditches were properly constructed and were of sufficient capacity for the purposes intended were questions of fact; and whether their construction in the manner that they were constructed amounted to negligence on the part of the city was also a question of fact.

4. Some criticisms are indulged by counsel with reference to the instructions given and refused. We have carefully examined the points made by counsel, and reach the conclusion that no error prejudicial to the city was committed by the court in the giving or refusing of instructions. Without desiring or intending any reflection whatever upon the learned judge who tried this case or on the eminent counsel engaged therein, we deem it our duty to say that we think the jury in this case was instructed too much. At the request of the plaintiff, the court gave the jury 12 instructions; at the request of the city, 15; and, in addition to these, there were 6 paragraphs or instructions in the charge given by the court to the jury on its own motion. The instructions in a case should be few in number, and should present to the jury the law applicable to the issues in the case in simple language and terse sentences. Numerous instructions or instructions with long and involved sentences are more likely to confuse the jury and lead it astray than to enlighten it and direct it to the material points of the case.

The judgment of the district court is affirmed.

BLIZZARD v. BOROUGH OF DANVILLE.

(34 Atl. 846, 175 Pa. St. 479.)

Supreme Court of Pennsylvania. May 18, 1896.

Appeal from court of common pleas, Montour county.

Action by W. H. J. Blizzard against the borough of Danville to recover damages for injury to property by the maintenance of a sewer. A compulsory nonsuit was entered, and from an order discharging a rule to show cause why such nonsuit should not be stricken off, plaintiff appeals. Reversed.

James Scarlet and H. M. Hinckley, for appellant. R. S. Ammerman and Grant Herring, for appellee.

WILLIAMS, J. / On the trial of this case it was made to appear that the borough of Danville began about 1860 to make use of a natural stream known as "Blizzard's Run" as a part of its general system of drainage. By means of a covered sewer and a paved alley, the surface drainage of nearly 20 acres has been turned into this stream, and one or more cellar drains have been connected with it. The stream thus became an open sewer, adopted and used as such by the borough authorities; and the duty of the borough to keep its channel open, and to remove accumulations of filth, ashes, or other material that obstructed the flow of the water and threw it out of its banks upon the adjoining lot owners was as clear as though the sewer had been constructed, instead of having been adopted, by the action of the municipal authorities. / The right of action by a lot owner grows, not out of the adoption of the stream as a sewer, which was an act wholly within the power of the municipality, but out of its negligence in not keeping the sewer in at least as good condition as it found it. There is therefore no question of prescriptive right in this case. There can be no prescriptive right to neglect so plain a municipal duty. If the borough had entered upon some portion of the plaintiff's lot in the construction of a sewer in 1860, the right of action for that trespass would be at this time

effectually barred by the lapse of time. But when a sewer, built, it may be, 100 or more years ago, gets into bad repair, the liability of the municipality for the injury inflicted upon lot owners arises when the injury occurs, and may be sued for within 6 years thereafter. The judgment of nonsuit proceeded, therefore, upon an erroneous idea of the relation of the parties and of the plaintiff's cause of action. We are inclined to think enough appears in the plaintiff's declaration to show that the injury complained of is charged to the failure on the part of the municipality to clean out and keep open the channel of the stream, so as in ordinary floods to afford a passage for its water as freely as the natural channel did before the action of 1860 was taken by the borough. This is the measure of duty which the municipality owes the plaintiff, and, if an amendment is needed in order to place the plaintiff's claim fully on the record, it can easily be made. But upon the evidence this case presented a question of fact for the jury. That was a question of negligence on the part of the municipality. If the borough has simply drained into this stream, and then given no attention to the effect of its action on the stream or on lot holders along its banks, and the stream has been choked, or its channel obstructed, in consequence of the character or quantity of the material drained into it, and injury has resulted to the plaintiff, the negligence of the borough authorities in not removing such obstruction and keeping the channel open is the true ground on which the plaintiff's right to recover must rest. Was the stream obstructed or filled up as the result of the adoption of this stream as an open sewer, and the drainage into it? Did the borough neglect to keep the channel open, and permit the overflow and accumulations complained of? Was the plaintiff injured in consequence of this negligence? If the jury so found, their only remaining duty was the ascertainment of his damages. The judgment of nonsuit entered in this case is now reversed, and set aside, and a venire facias de novo awarded.

TATE v. CITY OF ST. PAUL.

(58 N. W. 158, 56 Minn. 527.)

Supreme Court of Minnesota. Feb. 17, 1894.

Appeal from district court, Ramsey county; Charles D. Kerr, Judge.

Action by William E. Tate against the city of St. Paul. Judgment was ordered for plaintiff, and defendant appeals. Affirmed.

Leon T. Chamberlain, for appellant. John L. Townley, for respondent.

GILFILLAN, C. J. The action is to recover damages arising from a sewer laid by defendant, and with which plaintiff had connected, as he had a right to do, setting the water in it back so that it flooded plaintiff's basements. The defect alleged in the sewer was that it was of insufficient capacity to carry off the water brought into it. The defect appears to have existed in the original plan for sewerage that part of the city; that is, the city, in determining upon a system of sewers, determined upon the sizes required for the main sewer and for the lateral sewers running into it, and the size determined on for the former proved too small.

The rule is uniformly conceded that for injuries wholly incidental to and consequential upon the exercise by a municipal corporation of the legislative or discretionary powers entrusted to it (as distinguished from its ministerial acts) no action will lie against it. Instances of the application of that rule are furnished by *Lee v. City of Minneapolis*, 22 Minn. 13, where the power exercised was establishing the grade of a street under the charter, and *Alden v. City of Minneapolis*, 24 Minn. 254, where the city had established a system of grades for streets and sidewalks, and drains, gutters, catch-basins, and sewers, and had constructed the streets, sidewalks, drains, and gutters, and partially completed the sewers. The complaint was that the sewers, drains, gutters, and catch-basins were not sufficient to carry off the surface water falling in rains upon the streets, so that it flowed from the streets upon plaintiff's lot. The line between legislative acts and ministerial acts of a municipal corporation is not very clearly marked by the decisions, nor is it necessary to attempt to trace it in this case. Some of the earlier cases do not clearly recognize the distinction between injuries incidental to the exercise of municipal legislative functions, and direct and positive wrongs—such, for instance, as trespass—caused by it. The later and better authorities, however, recognize the distinction, and, while adhering to the rule that for the former no action will lie, hold that for the latter the party may recover. The distinction is apparent, though it is not clearly discussed in either of the cases, of *O'Brien v. City of St. Paul*, 18 Minn. 176, (Gil. 163,) and 25 Minn. 331; *Kobs v. City of Minneapolis*, 22 Minn. 159; and the *Lee and Alden Cases*, above cited. To determine when and upon what

plan a public improvement shall be made is, unless the charter otherwise provides, left to the judgment of the proper municipal authorities, and is, in its nature, legislative. And, although the power is vested in the municipality for the benefit and relief of property, error of judgment as to when or upon what plan the improvement shall be made, resulting only in incidental injury to the property, will not be ground of action; as, if, in grading streets to the authorized grades, the plan of the grading is inadequate to drain a lot of the surface water, or even if it make it more difficult and expensive for the owner to drain it, or make access to the lot more difficult, that is a result incidental to the improvement. But for a direct invasion of one's right of property, even though contemplated by, or necessarily resulting from, the plan adopted, an action will lie; otherwise, it would be taking private property for public use without compensation. Thus, if, in cutting a street down a grade, the soil of an abutting lot is precipitated into the cut, or if, in filling up to grade, the slope of the embankment is made to rest on private property, that is a direct invasion of property rights which cannot be justified, even though the plan adopted contemplates, or will necessarily produce, the result. Judge Dillon, in his work on *Municipal Corporations*, (4th Ed., §§ 1047-1051,) approves the rule, laid down in more recent decisions by some of our ablest courts, that if a sewer, whatever its plan, is so constructed as to cause a positive and direct invasion of private property, as by collecting and throwing upon it, to its damage, water or sewage which would not otherwise have flowed or found its way there, the corporation is liable. Conspicuous for their ability, among the cases referred to by him, are *Ashley v. Port Huron*, 35 Mich. 296, and *Seifert v. City of Brooklyn*, 101 N. Y. 136, 4 N. E. 321,—each, the former especially, a very interesting case. See, also, *Brayton v. Fall River*, 113 Mass. 218; *Lehn v. City and County of San Francisco*, 66 Cal. 76, 4 Pac. 965; *Weis v. City of Madison*, 75 Ind. 241. It is impossible to answer the reasoning of these cases, especially where the injury complained of constitutes a taking. That making one's premises a place of deposit for the surplus waters in the sewers in times of high water, or creating a nuisance upon them so as to deprive the owner of the beneficial use of his property, is an appropriation requiring compensation to be made, see *Weaver v. Boom Co.*, 28 Minn. 534, 11 N. W. 114.

The court below instructed the jury "that where a public work, for instance a sewer, as the same was originally planned and constructed, is found to result in direct and physical injury to the property of another, that would not otherwise have happened, and which, from its nature, is liable to be repeated and continuous, but is remediable by a change of plan or the adoption of prudent

measures, the corporation is liable for such damages as occur in consequence of the original cause, after notice and an omission to use ordinary care to remedy the evil." This is within the rule stated in Dillon and the cases cited, and, as it gives the corporation

an opportunity to correct or obviate the error in the original plan before liability, we do not hesitate to approve it. This is as far as we need go in this case. The evidence was such as to justify a verdict for plaintiff under that charge of the court. Order affirmed.

MAYOR, ETC., OF CITY OF NEW YORK et al. v. WORKMAN.

(14 C. C. A. 530, 67 Fed. 347.)

Circuit Court of Appeals, Second Circuit.
April 16, 1895.

No. 118.

Appeal from the District Court of the United States for the Southern District of New York.

This was a libel by Robert W. Workman against the mayor, aldermen, and commonalty of the city of New York, the fire department of that city, and James A. Gallagher, for damages caused by a collision. The district court rendered a decree for the libellant against the mayor, etc., and Gallagher. 63 Fed. 298. Respondents appeal.

Francis M. Scott and David J. Dean, for appellant mayor, etc., of city of New York. George L. Sterling, for appellant J. A. Gallagher. Chas. C. Burlingame and Harrington Putnam, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The evidence in the record adequately supports the conclusion of the court below that the injuries caused to the libellant's vessel by the impact of the fire boat were caused by the negligent management of the fire boat while the latter was trying to reach a convenient location to play upon a burning building near the pier at which the libellant's vessel was moored. The case, then, presents the legal question whether the municipal corporation, the mayor, etc., of the city of New York, is responsible for the negligence of the members of its fire department, committed while attempting to extinguish a fire within the corporate limits. That the suit is brought in a court of admiralty instead of a common-law court, and that the negligence consisted in the improper navigation of the vessel, are considerations which cannot affect the conclusion. Although the vessel may have been the direct instrumentality, the offending thing, in effecting a marine tort, neither the vessel nor her owners can be held responsible by reason of that circumstance alone. The common case of a collision of a vessel in tow of another and a third vessel, produced by the negligence of the towing vessel, is a sufficient illustration. If the vessel in tow is free from negligence, neither she nor her owner is liable for the injury. Accountability, either personally or upon the principle of agency, must concur with injury to give a cause of action in any tribunal, equally in admiralty as at common law. If the city of New York would not have been liable if one of its steam fire engines, manned by the members of the fire department, had, by want of due care, while endeavoring to reach a conflagration, injured an individual or his property, it cannot be liable in the present suit.

It is familiar law that the officers selected by a municipal corporation to perform a public service for the general welfare of the inhabitants or the community, in which the corporation has no private interest, and from which it derives no special benefit or advantage in its corporate capacity, are not to be regarded as the servants or agents of the municipality, and for their negligence or want of skill it cannot be held liable. This is so, notwithstanding such officers derive their appointment from, and are paid by, the corporation itself. In selecting and employing them, the municipality merely performs a political or governmental function; the duties intrusted to them do not relate to the exercise of corporate powers; and hence they are the agents or servants of the public at large. Upon this principle it has uniformly been decided by the courts that municipal corporations are not liable for the negligence or wrongful acts of the officers of the police or health departments, committed in the course of their ordinary employment. Unless the duties of the officers of the fire department are of a different complexion, and they are the servants of the municipality because they are engaged in performing one of its corporate functions, the same principle must extend immunity to the municipality for the negligent acts of these officers and their subordinates. A municipal corporation, like a private corporation, is liable to any person who has sustained injury in consequence of its neglect to perform a corporate duty; but because the duties of municipal corporations in respect to protecting their citizens from the dangers of fires are governmental, and not corporate, they are not liable to the owner of property injured by fire in consequence of their neglect to provide suitable fire apparatus, or to provide and keep in repair public cisterns, or the failure of their firemen to use proper efforts. *Wheeler v. Cincinnati*, 19 Ohio St. 19; *Patch v. Covington*, 17 B. Mon. 722; *Brinkmeyer v. Evansville*, 29 Ind. 187; *Weightman v. Washington*, 1 Black, 39, 49; *Kies v. City of Erie*, 135 Pa. St. 144, 19 Atl. 942; *Heller v. Sedalia*, 53 Mo. 159; *Robinson v. Evansville*, 87 Ind. 334. So uniform and numerous are the authorities against the proposition that a municipal corporation is liable for the negligent acts of these officers that to discuss it as an original question would seem to be inappropriate. In one of the most recent text-books on the law of municipal corporations, the rule is thus stated: "Municipal corporations are not liable for the negligence of their firemen, although they may be appointed and removed by the city, and the performance of their duties are wholly subject to its control." *Tjed. Mun. Corp.* § 333a. A reference to the following adjudicated cases, in which the rule has been applied, will suffice to show how universally it obtains in the courts of this country: *Hafford v. New Bedford*, 16 Gray, 297, in which a hose carriage on its way to a fire ran over

the plaintiff; *Fisher v. Boston*, 104 Mass. 87, in which the injury was caused from the bursting of hose; *Burrill v. Augusta*, 78 Me. 118, 3 Atl. 177, in which a horse was frightened by escaping steam from an engine left in the street; *Wild v. Paterson*, 47 N. J. Law, 406, 1 Atl. 490, in which the injury was caused from a defect in the brake of an engine; *Hayes v. Oshkosh*, 33 Wis. 314, in which damage was sustained by the negligent management of an engine in allowing the escape of sparks; *Wilcox v. City of Chicago*, 107 Ill. 334, a case of collision with a hook and ladder wagon; *Edgerly v. Concord*, 59 N. H. 78, a case of the negligent testing of a hydrant; *Howard v. San Francisco*, 51 Cal. 52, a case of collision with an engine; *McKenna v. St. Louis*, 6 Mo. App. 320, a case of the negligent management of hose carriage; *Jewett v. New Haven*, 38 Conn. 368, a similar case; *Grube v. City of St. Paul*, 34 Minn. 402, 26 N. W. 228, a similar case; *Welch v. Rutland*, 56 Vt. 228, a case of injury from slipping on ice caused by the escape of water from fire hydrant; *Greenwood v. Louisville*, 13 Bush, 226, in which plaintiff was negligently run over on the sidewalk by an engine; *Freeman v. City of Philadelphia*, 7 Wkly. Notes Cas. 45, and *Knight v. City of Philadelphia*, 15 Wkly. Notes Cas. 307, cases of careless driving of fire engine; *Dodge v. Granger*, 17 R. I. 664, 24 Atl. 100, a case of injury by the negligent projection of a ladder from an engine house; *Simon v. Atlanta*, 67 Ga. 618, a case of injury from a rope stretched across the street by the fire department.

It is quite immaterial that the duties of these officers are defined and the offices created by the charter or organic law of the municipality. The test of corporate liability for the acts of the officers of the municipality depends upon the nature of the duties with which they are charged. If these, being for the general good of the public as individual citizens, are governmental, they act for the state. If they are those which primarily and legitimately devolve upon the municipality itself, they are its agents. Thus in *Mead v. New Haven*, 40 Conn. 72, the city, pursuant to its charter, appointed an inspector of steam boilers, and passed a by-law which imposed a penalty on any person who should use a boiler without having it tested by an inspector. In a suit for the negligent act of the inspector, the court said: "The duty of inspection of boilers is governmental. The object of the inspection is to protect all citizens from danger who may come in contact with the boiler, or may be exposed in any way to danger from its unsafe condition. The city, as such, has no pecuniary or individual or pri-

vate interest in the matter; and although the power of the city over the subject is conferred by the charter, and not by the general law, yet the city must, we think, be regarded as the agent of the government, and acting for the state, and not for itself, in making the appointment of inspectors, and therefore not liable for the inspector's negligence."

The fire department of the city of New York derives its origin and defined powers from the same organic law as do the commissioners of charities and correction and the department of public instruction, and the officers of each are constituted by the appointment of the executive officers of the city. Of the commissioners of charities and correction the court of appeals said in *Maxmillian v. Mayor*, etc., 62 N. Y. 160: "It is seen at once that the powers and duties of the commissioners of charities and correction are not to be exercised and performed for the especial benefit of the defendant. It gets no emolument therefrom, nor any good as a corporation. It is the public, or individuals as members of the commonalty, who are interested in the due exercise of these powers, and the proper performance of their duties. * * * These chief officers, though in a sense its officers, as having no power unless after appointment by it, and as mainly confined within its territorial boundaries, are yet officers of the state government, in the sense that they perform its functions within a designated political division of the state."

Of the department of public instruction, the court of appeals said in *Ham v. Mayor*, etc., 70 N. Y. 459: "Although formally constituted a department of the municipal government, the duties which it was required to discharge were not local or corporate, but related and belonged to an important branch of the administrative department of the state government."

It was held in each of these cases that the city of New York was not liable for the negligence of an employé of one of these departments. And in *Thompson v. Mayor*, etc., 52 N. Y. Super. Ct. 427, it was held that the city was not liable for the negligent conduct of the employés of the fire department, as at present constituted. We entertain no doubt that the city was not liable for the negligent management of the fire boat in the present case, and that the libel against the mayor, etc., should have been dismissed by the district court. It is accordingly ordered that the cause be remitted to the district court, with instructions to dismiss the libel against the mayor, etc., with costs of this court and of the district court, and to affirm the decree against the respondent Gallagher, with costs.

GILLESPIE v. CITY OF LINCOLN.

(52 N. W. 811, 35 Neb. 34.)

Supreme Court of Nebraska. June 11, 1892.

Error to district court, Lancaster county; Field, Judge.

Action by Clark D. Gillespie, administrator of Clark D. Gillespie, deceased, against the city of Lincoln, to recover damages for the death of deceased. Judgment for defendant on demurrer to the petition. Plaintiff brings error. Affirmed.

Chas. O. Whedon and C. E. Magoon, for plaintiff in error. E. P. Holmes, City Atty., for defendant in error.

POST, J. This case comes into this court on a petition in error. The error assigned is the sustaining of a demurrer by the district court of Lancaster county to the petition of plaintiff in error, the material part of which is as follows: "That on and prior to the 29th day of May, 1889, the said defendant had an organized and paid fire department, and had and owned engines, hose, hose carts, ladders, wagons, trucks, and other apparatus for the use by, and which was used by, said defendant and its said fire department in extinguishing fires. That said defendant then had and owned horses, which were used by said defendant in drawing said wagons, trucks, hose carts, and engines to the place in said city where a fire might be burning, and for other purposes. That among other apparatus the said defendant then owned a large truck or wagon, upwards of twenty feet in length, which was used by the defendant in transporting about the city long ladders, used by said fire department. That said defendant, at the time of committing the wrongs herein-after mentioned, had in its pay and employ one Peter Keykendall, who was under the direction and control of the defendant, and whose duty it was, under the direction of said defendant, to drive the team attached to said ladder truck or wagon about the city; and said wagon was not at the time herein-before mentioned, May 29, 1889, supplied with any brake or lock or other appliance for stopping said wagon when in motion, or to assist the horses to said wagon attached in stopping the same; that the distance between the front and hind wheels to said truck or wagon was about eighteen feet; that said wagon or truck, when loaded with ladders and other apparatus, carried thereon, and with the driver thereon, weighed upwards of two thousand pounds. That Ninth street extends through said city from north to south, and intersects and crosses P, R, and S streets in said city, and said Ninth street and said P, R, and S streets have for many years last past been public streets in said city, and on said 29th day of May, 1889, said Ninth street was paved with wood, and between S and P streets was a paved and smooth street, and from S to R street had a smooth and level surface, and was free from obstruction, and

was paved with wood. That the said Peter Keykendall, under his employment, was by the defendant required to drive said ladder truck or wagon about the city when no fires were burning which required to be extinguished by said defendant or said fire department, for the purpose of exercising the horses to said wagon attached, and was also required to drive said horses attached to said wagon, when the same was heavily loaded, on and along the public streets of the said city at a furious rate of speed, and as fast as said horses could be made to run, without any regard whatever for the lives or safety of citizens of the city who might be upon the streets, and this when no fire or fires were burning which required the action of the defendant or its fire department to extinguish, for the sole and only purpose of exercising said horses. That on the 29th day of May, 1889, the said Peter Keykendall, then being in the employ of the defendant, and acting under the orders and direction of the defendant, drove a span of large, high-spirited, and powerful horses attached to said ladder truck or wagon about the public streets of said city, for the purpose of exercising said horses. Said wagon or truck was loaded with ladders and other apparatus, and the driver rode therein, and said wagon with its load weighed upwards of two thousand pounds; that said wagon was not on said day supplied with any lock or brake or other appliances for stopping or assisting in stopping said wagon when in motion, as the defendant then well knew. That said Keykendall on said day drove said span of horses to said wagon attached as aforesaid on and along said Ninth street at a furious and dangerous rate of speed, and as fast as said horses could be driven, when there was no fire burning which required the services of said fire department or any of its members or employes of said city to extinguish, but said horses were driven for exercise only; that Clark D. Gillespie, an infant of tender years, being then but six years of age, was at the time crossing said Ninth street near the place where said street intersects and crosses R street at the north side of said R street, and said span of horses were driven upon said Clark D. Gillespie, and he was thrown upon the pavement, and the front wheel of said wagon was driven over and across his body; that said boy, after being knocked down and run over by said horses, and by one of the front wheels of said wagon, raised his head and attempted to arise from the pavement, when he was struck and run over by one of the hind wheels of said truck or wagon, and was instantly killed. That the killing of said boy was caused by the driving over him of said team and wagon as aforesaid. Plaintiff further says that at said time said team and wagon were not being driven to any fire which required to be extinguished, but were being driven on and along said street for the sole and only purpose of exercising said horses, under the direction

and orders of the defendant, at a dangerous rate of speed, and were driven so fast that it was impossible for the said Clark D. Gillespie to escape being run over. That the said Clark D. Gillespie was the son of the plaintiff. That on the 22d of July, 1889, the plaintiff was by the county court of said Lancaster county duly appointed administrator of the estate of said Clark D. Gillespie, and gave the bond by said court required, and took the oath by law required in such case. That on or about the 22d of July, 1889, plaintiff presented to the city council his claim for damages sustained by the estate of said Clark D. Gillespie by reason of the killing of him, the said Clark D. Gillespie, together with the names of the witnesses and a statement of the time, place, nature, circumstances, and cause of the injury and damages complained of, which claim was verified by the oath of the plaintiff; that afterwards, and on or about the 12th of August, 1889, said claim was by the defendant and the mayor and council thereof, to which it was presented as aforesaid, rejected and disallowed. That by reason of the killing of said Clark D. Gillespie as aforesaid the estate of the deceased has sustained damages in the sum of \$5,000, for which sum plaintiff prays judgment, with interest from the 12th of August, 1889, and for costs.

The contention of the defendant in error is that no liability exists on the part of a city like Lincoln for injuries occasioned by the negligent acts of members of its fire department. This exemption is placed upon the ground that, in performing their duties, firemen act in obedience to a legislative command, and, although appointed and paid by the city, they are to be regarded rather as officers charged with a public duty than as servants of the city. Public policy, it is claimed, forbids the imposition upon a city of liability for the negligence of this class of employes, since they are engaged in the discharge of a duty imposed by law for the welfare of the public, and from which the city, as a corporation, derives no benefit or advantage. Counsel for plaintiff in error, while not conceding the rule to be as stated, insists that it could have no application to the case at bar, for the reason that the statute under which the fire department of the city of Lincoln is organized and governed is permissive only, and whatever is done by the city in that respect it does voluntarily, and therefore the rule respondent superior is applicable. To this proposition we cannot assent. The provision on the subject is found in subdivision 33, § 67, of the charter of the city of Lincoln: "Cities governed under the provisions of this act shall have power by ordinance to provide for the organization of a fire department, to procure fire engines, hooks, ladders, buckets, and other apparatus, and to organize fire engine, hook and ladder, and bucket companies, and to prescribe rules of duty and the government thereof, with such penalties as

the council may deem proper, not exceeding one hundred dollars, and to make the necessary appropriations therefor, and to establish regulations for the protection from and extinguishment of fires." This language, although permissive in form, is in one sense mandatory. True, it is not mandatory in the fullest sense of the word, since the duty of the city to provide protection to life and property from fire cannot be enforced by mandamus or other remedy. It is not every duty imposed upon the state, or the different agencies thereof called "municipal corporations," that can be thus enforced. *Kentucky v. Dennison*, 24 How. 66; *Dill. Mun. Corp.* (4th Ed.) 98. It is none the less a duty on the part of the city because the law has not provided a means for its enforcement by the mandate of the court. There existed a moral or equitable obligation on the part of the defendant city to provide means of protection from fires within its limits, and in the discharge of that duty provision was made for its fire department. If defendant is to answer for the wrongful act of Keykendall, the driver of the ladder wagon, it must be upon the rule respondent superior. It is clear that upon no other principle is it chargeable. In this connection, it should be noted that the claim is made by plaintiff that Keykendall, in driving the team at the time in question, was acting within the scope of his authority. Counsel says in his brief: "The exercising of the team was a proper thing to do. It lies in the way of a proper discharge of the functions of the department. It was not ultra vires. The way in which it was performed is what we complain of." Taking it for granted, then, that the driving of the team at the time in question was a proper exercise of the functions of the fire department of the city, and within the line of duty of the driver, we will proceed to examine some of the authorities bearing upon the question involved. In *Dill. Mun. Corp.* (4th Ed.) 974, the rule is stated thus: "If the corporation appoints or elects them, can control them in the discharge of their duties, can continue or remove them, can hold them responsible for the manner in which they discharge their trust, and if those duties relate to the exercise of corporate powers, and are for the peculiar benefit of the corporation in its local or special interest, they may justly be regarded as its agents or servants, and the maxim of respondent superior applies. But if, on the other hand, they are elected or appointed by the corporation, in obedience to the statute, to perform a public service, not peculiarly local or corporate, but because this mode of selection has been deemed expedient by the legislature in the distribution of the powers of the government, if they are independent of the corporation as to the tenure of their office and the manner of discharging their duties, they are not to be regarded as the servants or agents of the corporation, for whose acts or negligence it is impliedly liable, but as pub-

lic or state officers, with such powers and duties as the statute confers upon them, and the doctrine of respondeat superior is not applicable." Among the officers who are not servants of a city, within the foregoing rule, and for whose negligence it will not be chargeable, the learned author enumerates policemen, health officers, and firemen. The rule as to the liability of the latter the author states, in section 976, as follows: "The exemption from liability in these and the like cases is upon the ground that the service is performed by the corporation in obedience to an act of the legislature; is one in which the corporation, as such, has no particular interest, and from which it derives no especial benefit in its corporate capacity; that the members of the fire department, although appointed, employed, and paid by the city corporation, are not the agents and servants of the city, for whose conduct it is liable, but they act rather as officers of the city, charged with a public service, for whose negligence in the discharge of official duty no action lies against the city, without being expressly given. The maxim of respondeat superior has therefore no application." To the same effect, see 2 Thomp. Neg. 735; Shear. & R. Neg. 295, 296.

Hayes v. City of Oshkosh, 33 Wis. 314, was an action to recover damages resulting from a fire occasioned by the negligent use of an engine employed in suppressing a fire in the neighborhood. Chief Justice Dixon, in the opinion, says: "Neither the charter of the city nor the general statutes of the state contain any peculiar provision imposing liability in cases of this kind, and the decisions elsewhere are numerous and uniform that no such liability exists." Wilcox v. City of Chicago, 107 Ill. 334, is directly in point. In that case the plaintiff sought to recover for injuries occasioned by a collision between his carriage and a hook and ladder wagon of the city, through the negligence of the driver while in the discharge of his duty. In the opinion of the court, by Judge Walker, it is said: "To allow recoveries for the negligence of the fire department would almost certainly subject property holders to as great if not greater burdens than are suffered from damage by fire. Sound public policy would forbid it, if it were not prohibited by authority." In Fisher v. City of Boston, 104 Mass. 94, the plaintiff received personal injuries through the negligent use of hose by a fire company of the city in extinguishing a fire on adjoining premises. Judge Gray, in the opinion of the court, says: "But the extinguishment of fires is not for the immediate advantage of the town in its corporate capacity, nor is any part of the expense thereof authorized to be assessed upon owners of buildings or other special class of persons whose property is peculiarly benefited or protected thereby. In the absence of express statute, therefore, municipal corporations are no more liable to actions for injuries occasioned by reason of

negligence in using or keeping in repair the fire engines owned by them than in the case of a town or highway." In Hafford v. New Bedford, 16 Gray, 297, the plaintiff was struck and injured by a hose cart on a sidewalk of a public street. The firemen in charge thereof had negligently drawn it along and upon the sidewalk from the engine house 10 or 15 rods distant. The city was held not liable. In Jewett v. New Haven, 38 Conn. 368, the plaintiff, without negligence on his part, was struck and injured in a public street by a hose cart, which was being driven to the engine house for an additional supply of hose for use at a fire then raging, but at a dangerous rate of speed, and without the exercise of reasonable precaution for the safety of passers-by. It was held the rule respondeat superior did not apply, and the city was not chargeable. In Dodge v. Granger (R. I.) 24 Atl. 100, a very recent case, on the authority of cases above cited, the city was held not liable for injuries caused by contact with a ladder projecting across the sidewalk in front of an engine house, negligently permitted by the firemen to remain in that position while engaged in cleaning the house. This principle has been repeatedly applied to other officers or employés of municipal corporations, as in Maximilian v. Mayor, 62 N. Y. 160, where plaintiff's intestate was killed by a collision with an ambulance wagon, which was caused by the negligence of the driver, an employé of the commissioners of public charities and corrections; Haight v. Mayor, etc., 24 Fed. 93, where, following the last case, it is held that the city is not liable for damage caused by a collision with a steamboat owned by the city, but in the exclusive use of the board of charities and corrections; Condict v. Jersey City, 46 N. J. Law, 157, where the deceased was killed through the negligence of a driver employed by the board of public works to remove garbage from the streets to a public dumping ground; Caldwell v. City of Boone, 51 Iowa, 687, 2 N. W. 614, where the injury resulted from the wrongful act of a policeman paid by the city; Ogg v. City of Lansing, 35 Iowa, 495; Brown v. Vinalhaven, 65 Me. 402, and Barbour v. Ellsworth, 67 Me. 294,—in each of which it was held that the city was not chargeable with the negligence of its health officers; Burrill v. Augusta, 78 Me. 118, 3 Atl. 177, in which plaintiff's horse was frightened by the escape of steam from a fire engine, negligently allowed to remain in the street; Elliott v. Philadelphia, 75 Pa. St. 347, where plaintiff's horse was killed through the negligence of a police officer, by whom he had been arrested for violation of an ordinance of the city against fast driving; Bryant v. City of St. Paul, 33 Minn. 289, 23 N. W. 220, where the plaintiff fell into a vault negligently left open and exposed by the board of health. In the last case, the distinction between the class of officers above mentioned and other agents of the city is clearly pointed out by Vander-

burgh, J., as follows: "The duties of such officers are not municipal or corporate duties with which the corporation is charged in consideration of charter privileges, but are police or governmental functions which could be discharged equally well through agents appointed by the state, though usually associated with and appointed by the municipal body." There are many cases in the reports of the states and the United States in harmony with the foregoing among which are *Smith v. Rochester*, 76 N. Y. 506; *Van Horn v. City of Des Moines*, 63 Iowa, 447, 19 N. W. 293; *O'Meara v. New York*, 1 Daly, 425; *Wheeler v. Cincinnati*, 19 Ohio St. 19; *Howard v. San Francisco*, 51 Cal. 52; *Ham v. Mayor, etc.*, 70 N. Y. 459; *Welch v. Rutland*, 56 Vt. 228. The cases cited by plaintiff may be said to sustain the proposition that the law imposes upon a city the duty to keep its streets in a reasonably safe condition for use

by the public, and for a neglect of that duty it will be answerable. They are plainly distinguishable from those to which we have referred, since the duty of the city with reference to its streets is a corporate duty. As said by Judge Folger, in *Maximilian v. Mayor, supra*: "It is a duty with which the city is charged for its own corporate benefit, to be performed by its own agents, as its own corporate act." This distinction is made also in *Ehrgott v. Mayor, etc.*, 96 N. Y. 274, one of the cases cited by plaintiff. To the extent that the exemption of a city from liability for acts of officers herein enumerated affects the general rule of liability for obstruction of the streets of the city, it must be held to be an exception thereto,—an exception based upon a public policy which subordinates mere private interests to the welfare of the general public. The judgment is right, and is affirmed. The other judges concur.

WHITFIELD v. CITY OF PARIS.

(19 S. W. 566, 84 Tex. 431.)

Supreme Court of Texas. April 26, 1892.

Appeal from district court, Lamar county; E. B. McClellan, Judge.

Action by Sarah Whitfield against the city of Paris for personal injuries. A demurrer to the petition was sustained, and plaintiff appeals. Affirmed.

Dudley & Moore, for appellant. A. P. Park, for appellee.

TARLTON, J. This appeal is prosecuted from a judgment rendered by the district court of Lamar county in favor of appellee. The appellant sued appellee to recover for personal injuries inflicted upon her by one Beatis, in shooting at an unmuzzled dog, in the attempted enforcement of an ordinance of the city of Paris forbidding dogs to run at large. The correctness of the action of the trial court in sustaining a general demurrer to the plaintiff's petition is the only question to be determined. This petition, as stated by appellant, alleged the incorporation of the city under the general incorporation act of the state of Texas, being title 17 of the Revised Statutes of 1879, entitled "Cities and Towns." That the city had power, by its charter, to appoint policemen, prescribe their duties and compensation, and discontinue and remove any such policemen, at the pleasure of the city council. That the city also, by its charter, had power to tax, regulate, or restrain and prohibit the running at large of dogs, and to authorize their destruction when at large contrary to ordinance. That in July, 1888, the said city, by and through its city council, passed an ordinance prohibiting thereafter the running at large of dogs, without being muzzled, within its corporate limits, between the 1st of July and the 20th of September of each year, and requiring and making it the duty of the city marshal and any policeman to kill any such dog when found so running at large. That said city, by and through the city council, employed and appointed one Thomas Beatis to kill dogs under said ordinance, agreeing to pay him a certain stipulated sum per month for his services, the said Beatis then being in the employ and subject to the orders of the city. That, at the time and after the passage of said ordinance, the said city, acting by and through

the city council, made it the duty of and ordered the said Beatis to go upon the public streets, alleys, and highways of the city and kill all dogs found running at large without being muzzled. That about the 24th of August, 1888, while the said Beatis was in the employ and service of the city, and acting in the scope of his employment, and while executing and carrying out the express orders and commands of the city in killing a dog running at large without a muzzle, on one of the streets of the city, he, the said Beatis, recklessly, negligently, and carelessly shot off, discharged, and fired a double-barreled shotgun, loaded with powder and shot, (the shot being of the denomination commonly called "large goose shot,") on and along one of the most public streets in the city, where people were and are constantly passing in the discharge of the duties of their various avocations. That the said Beatis, in so negligently, carelessly, and recklessly shooting on and along said public street, in carrying out the orders of the city as aforesaid, inflicted upon plaintiff two painful and serious wounds. Then follow the allegations as to the plaintiff's injuries, suffering, and loss. The enactment of the ordinance referred to in the petition was an exercise by the city of its police power. Its purpose was to secure the safety, health, and welfare of the public. Beatis, the man whose act was complained of, was not, therefore, a mere servant or employé, though the petition so denominates him. He occupied the attitude of a policeman engaged in the enforcement of an ordinance of the city. In such a case, the maxim respondeat superior does not apply. Where a city acts as the agent of the state, it becomes the representative of sovereignty. It is not acting in the management of its private or corporate concerns, but in the interest of the public, and as the guardian of the health, peace, convenience, and welfare of the public. Under such circumstances, it is not liable for the acts of its officers or employés engaged in the execution of its ordinances. 2 Dill. Mun. Corp. § 975; Culver v. City of Streator (Ill. Sup.) 22 N. E. 810, and the numerous authorities there cited; Harrison v. Columbus, 44 Tex. 418; Keller v. Corpus Christi, 50 Tex. 614; Conway v. Beaumont, 61 Tex. 12; Galveston v. Posnainsky, 62 Tex. 130; Corsicana v. White, 57 Tex. 382. The judgment should be affirmed.

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